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*Attorneys for Defendant The Public Institution for Social Security*

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

<p>SECURITIES INVESTOR PROTECTION CORPORATION,</p> <p style="text-align: right;">Plaintiff-Applicant,</p> <p style="text-align: center;">v.</p> <p>BERNARD L. MADOFF INVESTMENT SECURITIES LLC,</p> <p style="text-align: right;">Defendant.</p>	<p>S.D.N.Y. Case No. _____</p> <p>Adv. Pro. No. 08-01789 (SMB)</p> <p>SIPA Liquidation</p> <p>(Substantively Consolidated)</p>
<p>In re:</p> <p>BERNARD L. MADOFF,</p> <p style="text-align: right;">Debtor.</p>	
<p>IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC,</p>	<p>Adv. Pro. No. 12-01002 (SMB)</p>

Plaintiff,
v.
THE PUBLIC INSTITUTION FOR SOCIAL SECURITY,
Defendant.

**NOTICE OF APPEAL**

**Part 1: Identify the appellant(s)**

1. Name(s) of appellant(s):  
The Public Institution for Social Security
2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:  

For appeals in an adversary proceeding.	For appeals in a bankruptcy case and not in an adversary proceeding.
<input type="checkbox"/> Plaintiff	<input type="checkbox"/> Debtor
<input checked="" type="checkbox"/> Defendant	<input type="checkbox"/> Creditor
<input type="checkbox"/> Other (describe) _____	<input type="checkbox"/> Trustee
	<input type="checkbox"/> Other (describe) _____

**Part 2: Identify the subject of this appeal**

1. Describe the judgment, order, or decree appealed from: Order denying Defendant The Public Institution for Social Security's Motion to Dismiss the Complaint under Fed. R. Civ. P. 12(b)(1), 12(b)(2), and 12(b)(6). The Order (Dkt. No. 150) is attached as **Exhibit A**, and the Memorandum Decision (Dkt. No. 149) is attached as **Exhibit B**.
2. State the date on which the judgment, order, or decree was entered: September 1, 2022

**Part 3: Identify the other parties to the appeal**

List the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

1. Party: Plaintiff-Appellee  
IRVING H. PICARD, Trustee  
for the Liquidation of Bernard  
L. Madoff Investment Securities  
LLC and the Chapter 7 Estate of  
Bernard L. Madoff

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2. Party: Defendant-Appellant  
THE PUBLIC INSTITUTION  
FOR SOCIAL SECURITY

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**Part 4: Optional election to have appeal heard by district court (applicable only in certain districts)**

If a Bankruptcy Appellate Panel is available in this judicial district, the Bankruptcy Appellate Panel will hear this appeal unless, pursuant to 28 U.S.C. § 158(c)(1), a party elects to have the appeal heard by the United States District Court. If an appellant filing this notice wishes to have the appeal heard by the United States District Court, check below. Do not check the box if the appellant wishes the Bankruptcy Appellate Panel to hear the appeal.

[Not applicable—No Bankruptcy Appellate Panel in this District.]

- ☐ Appellant(s) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

**Part 5: Sign below**

/s/ Leo Muchnik  
Signature of attorney for appellant

Dated: October 6, 2022

Name, address, and telephone number of attorney:

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Fee waiver notice: If appellant is a child support creditor or its representative and appellant has filed the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.

**[Note to inmate filers:** If you are an inmate filer in an institution and you seek the timing benefit of Fed. R. Bankr. P. 8002(c)(1), complete Director's Form 4170 (Declaration of Inmate Filing) and file that declaration along with the Notice of Appeal.]

## **EXHIBIT A**

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES INVESTOR PROTECTION  
CORPORATION,

Plaintiff-Applicant,

v.

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Defendant.

Adv. Pro. No. 08-01789 (CGM)

SIPA LIQUIDATION

(Substantively Consolidated)

In re

BERNARD L. MADOFF,

Debtor.

IRVING H. PICARD, Trustee for the Substantively  
Consolidated SIPA Liquidation of Bernard L. Madoff  
Investment Securities LLC and the Chapter 7 Estate of  
Bernard L. Madoff,

Plaintiff,

v.

The Public Institution for Social Security,

Defendant.

Adv. Pro. No. 12-01002 (CGM)

**ORDER DENYING THE PUBLIC INSTITUTION FOR SOCIAL  
SECURITY'S MOTION TO DISMISS THE COMPLAINT AND MOTION  
TO STRIKE THE DECLARATION OF BRIAN W. SONG**

Defendant the Public Institution for Social Security's ("Defendant" or "PIFSS") motion to dismiss the Complaint under the Foreign Sovereign Immunities Act, 28 U.S.C. § § 1602-1611, Bankruptcy Rule 7012(b), and Federal Rule of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6) (the "Motion to Dismiss") and Defendant's motion to strike the declaration of Brian W. Song and

all attached exhibits numbered 1 through 13 (the “**Motion to Strike**”) came on for hearing before the Court on July 13, 2022 (the “**Hearing**”). The Court has considered the Motion to Dismiss and the Motion to Strike, the papers filed in support of and in opposition to the motions, the Complaint, and the statements of counsel at the Hearing, and the Court has issued a memorandum decision, dated August 17, 2022, regarding the Motion (the “**Decision**”). For the reasons set forth in the Decision, **IT IS ORDERED**:

1. The Motion to Dismiss the Complaint is denied.
2. The Motion to Strike is denied.
3. The deadline for Defendant to file an answer to the Complaint is October 14, 2022.
4. The Court shall retain jurisdiction to implement or enforce this Order.

**Dated: September 1, 2022**  
**Poughkeepsie, New York**



**/s/ Cecelia G. Morris**

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**Hon. Cecelia G. Morris**  
**U.S. Bankruptcy Judge**

## **EXHIBIT B**

**NOT FOR PUBLICATION**

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION  
CORPORATION,

Plaintiff-Applicant,

v.

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Defendant.

No. 08-01789 (CGM)

SIPA LIQUIDATION

(Substantively Consolidated)

In re:

BERNARD L. MADOFF,

Debtor.

IRVING H. PICARD, Trustee for the Liquidation of  
Bernard L. Madoff Investment Securities LLC,

Plaintiff,

v.

The Public Institution for Social Security,

Defendant.

Adv. Pro. No. 12-01002 (CGM)

**MEMORANDUM DECISION DENYING DEFENDANT'S MOTION TO  
DISMISS AND MOTION TO STRIKE**

**A P P E A R A N C E S :**

*Attorneys for Irving H. Picard, Trustee for the Substantively Consolidated SIPA  
Liquidation of Bernard L. Madoff Investment Securities LLC and the Chapter 7 Estate of  
Bernard L. Madoff*

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By: Brian Song (via Zoom)

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By: Joseph P. Davis (via Zoom)  
Alison T. Holdway (via Zoom)

**CECELIA G. MORRIS**  
**UNITED STATES BANKRUPTCY JUDGE**

Pending before the Court is the motion by the Defendant, the Public Institution for Social Security (“PIFSS”), to dismiss the complaint of Irving Picard, the trustee (“Trustee”) for the liquidation of Bernard L. Madoff Investment Securities LLC (“BLMIS”) seeking to recover subsequent transfers allegedly consisting of BLMIS customer property. PIFSS seeks dismissal for lack of subject matter jurisdiction, for lack of personal jurisdiction, for failure to plead a cause of action due to improper adoption by reference; for failure to state a claim due to the safe harbor provision of the Bankruptcy Code, and for failure to plead that the transfers from BLMIS were customer property. The Defendants further moves to strike the declaration of Brian W. Song (the “Song Declaration”) and all attached exhibits, numbered 1 through 13. For the reasons set forth herein, the motion to dismiss and motion to strike are denied in their entirety.

### **Jurisdiction**

This is an adversary proceeding commenced in this Court, in which the main underlying SIPA proceeding, Adv. Pro. No. 08-01789 (CGM) (the “SIPA Proceeding”), is pending. The SIPA Proceeding was originally brought in the United States District Court for the Southern District of New York (the “District Court”) as *Securities Exchange Commission v. Bernard L. Madoff Investment Securities LLC et al.*, No. 08-CV-10791, and has been referred to this Court. This Court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b) and (e)(1), and 15 U.S.C. § 78eee(b)(2)(A) and (b)(4).

This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (F), (H) and (O). Submit matter jurisdiction and personal jurisdiction have been contested by the Defendant and will be discussed *infra*.

### **Background**

The Court assumes familiarity with the background of the BLMIS Ponzi scheme and its SIPA proceeding. *See Picard v. Citibank, N.A. (In re BLMIS)*, 12 F.4th 171, 178–83 (2d Cir. 2021), *cert. denied sub nom. Citibank, N.A. v. Picard*, 142 S. Ct. 1209, 212 L. Ed. 2d 217 (2022).

This adversary proceeding was filed on January 5, 2012. Compl., ECF<sup>1</sup> No. 1. The Defendant was a government agency of the State of Kuwait responsible for investing the assets of and administering the Kuwaiti social security system. *Id.* ¶ 3. Via the complaint (“Complaint”), the Trustee seeks to recover subsequent transfers made to the Defendant. *Id.* ¶ 2. The subsequent transfers were derived from investments with BLMIS made by other funds, including Fairfield Sentry Limited (“Fairfield Sentry”). *Id.* These funds are referred to as “feeder funds” because the intention of the fund was to invest in BLMIS. *Id.* ¶ 7.

Following BLMIS’s collapse, the Trustee filed an adversary proceeding against Fairfield Sentry and related defendants to avoid and recover fraudulent transfers of customer property in the amount of approximately \$3 billion. *Id.* ¶¶ 35, 36. In 2011, the Trustee settled with Fairfield Sentry. *Id.* ¶ 40. As part of the settlement, Fairfield Sentry consented to a judgment in the amount of \$3.054 billion (Consent J., 09-01239-cgm, ECF No. 109) but repaid only \$70 million to the BLMIS customer property estate. The Trustee then commenced a number of adversary proceedings against subsequent transferees like Defendant to recover the approximately \$3 billion in missing customer property. The Trustee alleges that the Defendant received

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<sup>1</sup> Unless otherwise indicated, all references to “ECF” are references to this Court’s electronic docket in adversary proceeding 12-01002-cgm.

approximately \$20,000,000 of funds initially transferred from BLMIS to Fairfield Sentry and subsequently from Fairfield Sentry to the Defendant. Compl. ¶ 41, ECF No. 1; Stip., ECF 111 (amending Count One of the Complaint to recovery of one transfer in the amount of \$20,000,000).

### **Discussion**

#### **Subject Matter Jurisdiction**

This Court has subject matter jurisdiction over these adversary proceedings pursuant to 28 U.S.C. §§ 1334(b) and 157(a), the District Court’s Standing Order of Reference, dated July 10, 1984, and the Amended Standing Order of Reference, dated January 31, 2012. In addition, the District Court removed the SIPA liquidation to this Court pursuant to SIPA § 78eee(b)(4), (*see* Order, Civ. 08– 01789 (Bankr. S.D.N.Y. Dec. 15, 2008), at ¶ IX (ECF No. 1)), and this Court has jurisdiction under the latter provision. Personal jurisdiction has been contested by this Defendant and will be discussed *infra*.

The Defendant objects to the Court’s subject matter jurisdiction, arguing that it is immune from liability under the Foreign Sovereign Immunities Act (the “FSIA”). Mot. to Dismiss, ECF No. 118. The FSIA, 28 U.S.C. §§ 1602–1611, determines whether a federal court may exercise jurisdiction over a foreign state. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443, 109 S.Ct. 683, 693, 102 L. Ed. 2d 818 (1989) (“[T]he FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country.”). A foreign state is “presumptively immune from the jurisdiction of United States courts; unless a specified exception applies.” *Saudi Arabia v. Nelson*, 507 U.S. 349, 355, 113 S. Ct. 1471, 1476, 123 L. Ed. 2d 47 (1993). Where no exception applies, “federal courts lack subject-matter jurisdiction over claims against foreign states.” *Picard v. Bureau of Labor Ins. (In re Bernard L.*

*Madoff*), 480 B.R. 501, 510 (Bankr. S.D.N.Y. 2012) (“*BLP*”). After the Defendant has made a prima facie case that it is a foreign state, the “burden shifts to the plaintiff, who must then produce evidence to demonstrate that immunity should not be granted under exceptions to the FSIA.” *Id.* (citing *Cargill Int’l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir.1993)).

The Defendant is a Foreign State Under the FSIA

The FSIA defines “foreign state” to include “a political subdivision of a foreign state or an “agency or instrumentality of a foreign state as defined in subsection (b).” 28 U.S.C. § 1603(a). The Trustee has conceded that the Defendant is a foreign state under the FSIA. Compl. ¶ 22; Reply 7, ECF No. 122. The Defendant is presumptively immune from the jurisdiction of this Court. The Trustee argues that the Defendant is nevertheless exempt from immunity under the FSIA’s commercial activity exception.

The Commercial Activities Exception to the FSIA Applies

Under 28 U.S.C.A. § 1605, a foreign state is not immune from jurisdiction of the federal courts in cases

in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). The Defendant argues that only the third and final clause of the exception could apply as it is “undisputed that PIFSS is a foreign governmental agency and that its conduct occurred outside the United States”. Mot. to Dismiss, ECF No. 118. The final clause of the commercial activities exception,

consists of three elements: (1) the operative act (i.e., the gravamen of the complaint) must have occurred outside the United States, (2) the act must have occurred in connection with a commercial activity of the foreign state elsewhere, and (3) the act [must have] cause[d] a direct effect in the United States.

*MMA Consultants I, Inc. v. Republic of Peru*, 719 F. App'x 47, 54 (2d Cir. 2017) (cleaned up).

The gravamen of the complaint is the basis or foundation of a claim, that is, those elements that, if proven, would entitle a plaintiff to relief. *Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 107 (2d Cir. 2016). The Defendant and the Trustee agree that the gravamen of the Complaint is PIFSS's receipt of funds due to its subscription into Fairfield Sentry. Mot. at 10, ECF No. 118; Opp'n at 8, ECF No. 122. This conduct occurred outside of the territory of the United States. *Id.* The Trustee has met the first prong of the final clause of the commercial activities exception.

The Act must have occurred in connection with a commercial activity. The FSIA defines "commercial activity" as "a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). The activity of a foreign state is "commercial" within the meaning of the FSIA "if the sovereign undertakes the act 'not as regulator of a market, but in the manner of a private player within it.'" *MMA Consultants I, Inc.*, 719 F. App'x at 52 (quoting *Republic of Argentina v. Weltover, Inc.* 504 U.S. 607, 614, 112 S. Ct. 2160, 2166, 119 L. Ed. 2d 394 (1992)). Judge Lifland found a foreign state agency's investment in Fairfield Sentry to be a commercial activity as it "did not involve the use of powers peculiar to sovereigns." *BLI*, 480 B.R. at 512.

The Complaint has alleged that PIFSS entered into subscription agreements with Fairfield Sentry and received subsequent transfers of BLMIS funds through Fairfield Sentry totaling approximately \$30,000,000. Compl. ¶¶ 6, 7, 34–42, ECF No. 1. PIFSS was acting as a private player within a market through these actions, not as a regulator of a market. PIFSS does not dispute that the actions are commercial activity as it is used in the FSIA. Rather, PIFSS assumes this second prong *arguendo* and argues that the complaint should be dismissed for failure to

plead any direct effect in the United States. The issue then is whether the Trustee has satisfied the third prong; that is, whether the Defendant's actions had a direct effect in the United States.

Under the third clause of the commercial activities exception, "an effect is direct if it follows as an immediate consequence of the defendant's ... activity." *Republic of Argentina*, 504 U.S. at 618 (internal quotation marks omitted); *see also MMA Consultants I, Inc.*, 719 F. App'x at 54. In construing whether the effect constitutes a "direct effect in the United States," the Court will be mindful of "providing access to the courts to those aggrieved by the commercial acts of a foreign sovereign." *Texas Trading & Mill. Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 312 (2d Cir. 1981) (internal quotation marks omitted) *overruled on other grounds by Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009); *see also BLI*, 480 B.R. at 513 (finding that courts in the Second Circuit must liberally construe what constitutes a "direct effect in the United States"). The effect must be more than merely "fortuitous or incidental, playing only a tangential role in the lawsuit." *BLI*, 480 B.R. at 513 (citing *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 999 F.2d 33, 36 (2d Cir. 1993))

In *BLI*, Judge Lifland denied a similar motion to dismissed based on a FSIA claim of immunity. Judge Lifland found that the *BLI* defendant's actions caused a direct effect in the United States by "causing a two-way flow of funds" in the "form of subscription and redemption payments" into BLMIS to invest in the United States and from BLMIS in "the form of profits from those investments." *BLI*, 480 B.R. at 513.

The Defendant argues that *BLI* was overruled by the Supreme Court in *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 136 S.Ct. 390, 193 L. Ed. 2d 269 (2015). This argument is unavailing. The Supreme Court, in *OBB Personenverkehr*, examined the first clause of the commercial activities exception. *Id.* at 31 n.1 ("As Sachs relies only on the first clause to

establish jurisdiction over her suit, we limit our inquiry to that clause.”). The Court determined that the conduct constituting the gravamen of the personal injury suit against the Austrian state-owned railway carrier occurred abroad, where the plaintiff fell onto railroad tracks while attempting to board a train. *Id.* at 35. The Court found that the suit was not based upon the sale of a Eurail ticket in the United States. *Id.* at 38. The Court did not address or overrule Judge Lifland’s holding in *BLI*.

Here, the Trustee’s Complaint alleges the Defendant’s subscription into and redemption out of Fairfield Sentry. These actions created a two-way flow of funds that had a direct effect in the United States. As immunity under the FSIA does not apply due to the third clause of the commercial activities exception, the Court need not consider whether the Defendant’s conduct satisfied the first or second clauses. PIFSS is not entitled to immunity under the FSIA.

### **Personal Jurisdiction**

PIFSS objects to the Trustee’s assertion of personal jurisdiction. The Trustee argues in the Complaint that the Defendant purposefully availed itself of the laws of the United States and New York by directing funds to be invested with New York-based BLMIS through Fairfield Sentry, investing in a structured product based on Fairfield Sentry’s investment returns through the Bank of New York, and maintaining regular contact with Fairfield Greenwich Group account representatives located in New York. Compl. ¶¶ 6–8, ECF No. 1.

To survive a motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, the Trustee “must make a prima facie showing that jurisdiction exists.” *SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 342 (2d Cir. 2018) (quoting *Penguin Grp. (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 34–35 (2d Cir. 2010)). A trial court has considerable procedural leeway when addressing a pretrial dismissal motion under Rule 12(b)(2).

*Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 84 (2d Cir. 2013). “It may determine the motion on the basis of affidavits alone; or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion.” *Id.* (quoting *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981)); *see also Picard v. BNP Paribas S.A. (In re BLMIS)*, 594 B.R. 167, 187 (Bankr. S.D.N.Y. 2018) (same).

“Prior to discovery, a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith, legally sufficient allegations of jurisdiction.” *Dorchester Fin.*, 722 F.3d at 84–85 (quoting *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir. 1990)); *Picard v. Fairfield Greenwich Grp. (In re Fairfield Sentry Ltd.)*, 627 B.R. 546, 565 (Bankr. S.D.N.Y. 2021) (same). In this case, the Trustee has alleged legally sufficient allegations of jurisdiction simply by stating that PIFSS “knowingly directing funds to be invested with New York-based BLMIS.” This allegation alone is sufficient to establish a prima facie showing of jurisdiction over the Defendant at the pre-discovery stage of litigation. This was not the only allegation made by the Trustee.

At the pre-discovery stage, the allegations need not be factually supported. *See Dorchester Fin. Securities Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 85 (2d Cir. 2013) (an averment of facts is necessary only after discovery). In order to be subjected to personal jurisdiction in the United States, due process requires that a defendant have sufficient minimum contacts with the forum in which defendant is sued “such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *BLI*, 480 B.R. at 516 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). The pleadings and affidavits are to be construed “in the light most favorable to the plaintiffs, resolving all doubts in their favor.” *Chloé v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 163 (2d Cir. 2010) (quoting *Porina v. Marward*

*Shipping Co.*, 521 F.3d 122, 126 (2d Cir. 2008)); *Picard v. BNP Paribas S.A. (In re BLMIS)*, 594 B.R. 167, 187 (Bankr. S.D.N.Y. 2018).

The Supreme Court has set out three conditions for the exercise of specific jurisdiction over a nonresident defendant. First, the defendant must have purposefully availed itself of the privilege of conducting activities within the forum State or have purposefully directed its conduct into the forum State. Second, the plaintiff's claim must arise out of or relate to the defendant's forum conduct. Finally, the exercise of jurisdiction must be reasonable under the circumstances.

*U.S. Bank Nat'l Ass'n v. Bank of Am. N.A.*, 916 F.3d 143, 150 (2d Cir. 2019) (cleaned up).

#### Purposeful Availment

"[M]inimum contacts . . . exist where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there." *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 82 (2d Cir. 2018). "Although a defendant's contacts with the forum state may be intertwined with its transactions or interactions with the plaintiff or other parties, a defendant's relationship with a third party, standing alone, is an insufficient basis for jurisdiction." *U.S. Bank Nat'l Ass'n v. Bank of Am. N.A.*, 916 F.3d 143, 150 (2d Cir. 2019) (cleaned up). "It is insufficient to rely on a defendant's random, fortuitous, or attenuated contacts or on the unilateral activity of a plaintiff with the forum to establish specific jurisdiction." *Id.*

A party "purposefully avail[s] itself of the benefits and protections of New York laws by knowing, intending and contemplating that the substantial majority of funds invested in Fairfield Sentry would be transferred to BLMIS in New York to be invested in the New York securities market." *BLI*, 480 B.R. at 517.

PIFSS argues that the Trustee has failed to allege sufficient minimum contacts with the United States. The Complaint suggests otherwise. In the Complaint, the Trustee alleges that PIFSS "knowingly directed funds to be invested with New York-based BLMIS through Fairfield

Sentry” and “knowingly received subsequent transfers from BLMIS by withdrawing money from Fairfield Sentry.” Compl. ¶ 6, ECF No. 1. The Trustee has also alleged that Fairfield Sentry invested almost all of its assets in BLMIS. *See* Fairfield Compl. ¶ 89, *Picard v. Fairfield Inv Fund Ltd.*, Adv. Pro. No. 09-1239, ECF No. 286 (the “Fairfield Amended Complaint”) (“Under Fairfield Sentry’s offering memorandum, the fund’s investment manager was required to invest no less than 95% of the fund’s assets through BLMIS.”) (adopted by reference, at paragraph 35, of this Complaint); *see, e.g.* Song Decl., Fairfield Sentry Information Memo., ECF No. 123, Ex. 1 (“The Company will seek to achieve capital appreciation of its assets by allocating its assets to an account at Bernard L. Madoff Investment Securities (‘BLM’), a registered broker-dealer in New York, New York, which employs an options trading strategy described as ‘split strike conversion.’”).

The Trustee has submitted additional evidence in response to the motion to dismiss. Attached as exhibits to the Song Declaration, the Trustee has provided evidence that PIFSS bank accounts in New York to send subscription payments to Fairfield Sentry totaling \$5,000,000. Song Decl., Ex. 3. PIFSS used correspondent accounts in New York to send subscription payments totaling \$15,000,000 and receive subsequent transfers totaling \$20,000,000. Song Decl., Ex. 2. PIFSS’s offshore subsidiary, Wafra, met with representatives of the Fairfield Greenwich Group at Fairfield’s offices in New York to discuss investment with Fairfield Sentry. Song Decl., Ex. 10. These allegations are sufficient to constitute a prima facie showing of jurisdiction. *Dorchester Fin. Securities Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 85 (2d. Cir. 2013).

The Defendant has moved to strike the Song Declaration and all attached exhibits. As will be discussed below, the Court will deny the Defendant’s motion to strike. Nevertheless,

even without the Song Declaration and attached exhibits, the Trustee has sufficiently plead allegations supporting jurisdiction over the Defendant.

Arise Out of or Relate to the Defendant's Forum Conduct

As to the second prong, the suit must “arise out of *or relate to* the defendant’s contacts with the forum.” *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, \_\_\_ U.S. \_\_\_, 141 S. Ct. 1017, 1026, 209 L. Ed. 2d 225 (2021) (emphasis in original). “[P]roof that a plaintiff’s claim came about because of the defendant’s in-state conduct” is not required. *Id.* at 1027. Instead, the court need only find “an affiliation between the forum and the underlying controversy.” *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011); *Picard v. BNP Paribas S.A. (In re BLMIS)*, 594 B.R. 167, 190 (Bankr. S.D.N.Y. 2018) (“Where the defendant’s contacts with the jurisdiction that relate to the cause of action are more substantial, however, it is not unreasonable to say that the defendant is subject to personal jurisdiction even though the acts within the state are not the proximate cause of the plaintiff’s injury.”) (internal quotations omitted).

The Trustee is asserting subsequent transfer claims against Defendant for monies it received from the Fairfield Sentry. Compl. ¶¶ 44–47, ECF No. 1. These allegations are directly related to its investment activities with Fairfield and BLMIS. *Picard v. BNP Paribas S.A. (In re BLMIS)*, 594 B.R. 167, 191 (Bankr. S.D.N.Y. 2018) (finding that the redemption and other payments the defendants received as direct investors in a BLMIS feeder fund arose from the New York contacts such as sending subscription agreements to New York, wiring funds in U.S. dollars to New York, sending redemption requests to New York, and receiving redemption payments from a Bank of New York account in New York, and were the proximate cause of the

injuries that the Trustee sought to redress). The suit is affiliated with the alleged in-state conduct. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

#### Reasonableness

Having found sufficient minimum contacts, the Court must determine if exercising personal jurisdiction over the Defendant is reasonable and “comport[s] with fair play and substantial justice.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) (internal quotations omitted). Factors the Court may consider include the burden on the defendant, the forum State’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining convenient and effective relief, the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.

The exercise of jurisdiction is reasonable. The Defendant is not burdened by this litigation. Defendant has actively participated in this Court’s litigation for over ten years. It is represented by highly competent U.S. counsel, filed a claim in this SIPA litigation, and submitted to the jurisdiction of New York courts’ when it signed its subscription agreements with Fairfield Sentry. The forum and the Trustee both have a strong interest in litigating BLMIS adversary proceedings in this Court. *Picard v. Maxam Absolute Return Fund, L.P. (In re BLMIS)*, 460 B.R. 106, 117 (Bankr. S.D.N.Y. 2011), *aff’d*, 474 B.R. 76 (S.D.N.Y. 2012); *Picard v. Chais (In re BLMIS)*, 440 B.R. 274, 278 (Bankr. S.D.N.Y. 2010); *Picard v. Cohmad Sec. Corp. (In re BLMIS)*, 418 B.R. 75, 82 (Bankr. S.D.N.Y. 2009); *Picard v. Fairfield Greenwich Grp., (In re Fairfield Sentry Ltd.)*, 627 B.R. 546, 568 (Bankr. S.D.N.Y. 2021); *see also In re Picard*, 917 F.3d 85, 103 (2d Cir. 2019) (“The United States has a compelling interest in allowing domestic estates to recover fraudulently transferred property.”).

By alleging that Defendant intentionally invested in BLMIS, the Trustee has met his burden of alleging jurisdiction as to each subsequent transfer that originated with BLMIS. The Trustee has made a prima facie showing of personal jurisdiction with respect to the subsequent transfer at issue in this Case.

### **12(b)(6) Standard**

“To survive a motion to dismiss, the complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). The claim is facially plausible when a plaintiff pleads facts that allow the Court to draw a “reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (“Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”). In deciding a motion to dismiss, the Court should assume the factual allegations are true and determine whether, when read together, they plausibly give rise to an entitlement of relief. *Iqbal*, 556 U.S. at 679. “And, of course, a well-pl[ed] complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.” *Twombly*, 550 U.S. at 556.

In deciding the motion, “courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322

(2007). A complaint is “deemed to include any written instrument attached to it as an exhibit[,] . . . documents incorporated in it by reference[,]” and other documents “integral” to the complaint. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152–53 (2d Cir. 2002) (citations omitted). A document is “integral” to a complaint when the plaintiff has “actual notice” of the extraneous information and relied on it in framing the complaint. *DeLuca v. AccessIT Grp., Inc.*, 695 F. Supp. 2d 54, 60 (S.D.N.Y. 2010) (citing *Chambers*, 282 F.3d at 153).

The Trustee is seeking to recover the subsequent transfer of approximately \$20 million made in 2004 to PIFSS by Fairfield Sentry (“Count One”).

Count One: Recovery of Subsequent Transfers

Section 550(a) of the Bankruptcy Code states:

Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--

- (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
- (2) any immediate or mediate transferee of such initial transferee.

“To plead a subsequent transfer claim, the Trustee must plead that the initial transfer is avoidable, and the defendant is a subsequent transferee of that initial transferee, that is, that the funds at issue originated with the debtor.” *Picard v. BNP Paribas S.A. (In re BLMIS)*, 594 B.R. 167, 195 (Bankr. S.D.N.Y. 2018); *see also SIPC v. BLMIS (In re Consolidated Proceedings on 11 U.S.C. § 546(e))*, No. 12 MC 115(JSR), 2013 WL 1609154, at \*7 (S.D.N.Y. Apr. 15, 2013) (consolidated proceedings on 11 U.S.C. § 546(e)). “Federal Civil Rule 9(b) governs the portion of a claim to avoid an initial intentional fraudulent transfer and Rule 8(a) governs the portion of a claim to recover the subsequent transfer. *Picard v. BNP Paribas S.A. (In re BLMIS)*, 594 B.R. 167, 195 (Bankr. S.D.N.Y. 2018) (citing *Sharp Int’l Corp. v. State St. Bank & Trust Co., (In re*

*Sharp Int'l Corp.*), 403 F.3d 43, 56 (2d Cir. 2005) and *Picard v. Legacy Capital Ltd. (In re BLMIS)*, 548 B.R. 13, 36 (Bankr. S.D.N.Y. 2016), *rev'd on other grounds, Picard v. Citibank, N.A. (In re BLMIS)*, 12 F.4th 171 (2d Cir. 2021)).

To properly plead a subsequent transfer claim, the Trustee need only provide “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P.

8(a)(2). “The plaintiff must allege the necessary vital statistics—the who, when, and how much—of the purported transfers to establish an entity as a subsequent transferee of the funds. However, the plaintiff’s burden at the pleading stage does not require dollar-for-dollar accounting of the exact funds at issue.” *Picard v. BNP Paribas S.A. (In re BLMIS)*, 594 B.R. 167, 195 (Bankr. S.D.N.Y. 2018). While the Trustee must allege that the initial transfer from BLMIS to Fairfield Sentry is avoidable, he is not required to avoid the transfer received by the initial transferee before asserting an action against subsequent transferees. The Trustee is free to pursue any of the immediate or mediate transferees, and nothing in the statute requires a different result. *IBT Int’l, Inc. v. Northern (In re Int’l Admin. Servs., Inc.)*, 408 F.3d 689, 706-07 (11th Cir. 2005).

The Trustee pleaded the avoidability of the initial transfer (from BLMIS to Fairfield Sentry) by adopting by reference the entirety of the Fairfield Amended Complaint filed against Fairfield Sentry in adversary proceeding 09-1239. Compl. ¶ 35, ECF No. 1 (“The Trustee incorporates by reference the allegations contained in the Fairfield Amended Complaint as if fully set forth herein.”). Whether the Fairfield Amended Complaint properly pleads the avoidability of the initial transfer, is governed by Rule 9(b). Rule 9(b) states: “In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” Fed. R. Civ. P. 9(b). “Where the actual fraudulent transfer claim is asserted by a bankruptcy

trustee, applicable Second Circuit precedent instructs courts to adopt a more liberal view since a trustee is an outsider to the transaction who must plead fraud from second-hand knowledge. Moreover, in a case such as this one, where the Trustee's lack of personal knowledge is compounded with complicated issues and transactions that extend over lengthy periods of time, the trustee's handicap increases, and even greater latitude should be afforded." *Picard v. Cohmad Secs. Corp.*, (*In re BLMIS*), 454 B.R. 317, 329 (Bankr. S.D.N.Y. 2011) (cleaned up).

Adoption by Reference of the Fairfield Amended Complaint

Adoption by reference is governed by Rule 10 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 10(c). Rule 10(c) states: "A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion." The district court has already found that adoption by reference of the entire Fairfield Amended Complaint is proper. *See SIPC v. BLMIS (In re Consolidated Proceedings on 11 U.S.C. § 550(a))*, 501 B.R. 26, 36 (S.D.N.Y. 2013) ("The Trustee's complaint against Standard Chartered Financial Services incorporates by reference the complaints against Kingate and Fairfield, including the allegations concerning the avoidability of the initial transfers, and further alleges the avoidability of these transfers outright. Thus, the avoidability of the transfers from Madoff Securities to Kingate and Fairfield is sufficiently pleaded for purposes of section 550(a).") (cleaned up).

The Court will follow the district court's instruction. As was explained in *In re Geiger*, pleadings filed in the "same action" may be properly adopted by reference in other pleadings in that action. 446 B.R. 670, 679 (Bankr. E.D. Pa. 2010). The Fairfield Amended Complaint was filed in the "same action" as this adversary proceeding for purposes of Rule 10(c). *Id.* Cases within this SIPA proceeding are filed in the same "proceeding"—the SIPA proceeding. *In re Terrestar Corp.*, No. 16 CIV. 1421 (ER), 2017 WL 1040448, at \*4 (S.D.N.Y. Mar. 16, 2017)

(“Adversary proceedings filed in the same bankruptcy case do not constitute different cases.”); *see also Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 610 B.R. 197, 237 (Bankr. S.D.N.Y. 2019) (“The prior decisions within this SIPA proceeding constitute law of the case . . . .”); *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 603 B.R. 682, 700 (Bankr. S.D.N.Y. 2019), (citing *In re Motors Liquidation Co.*, 590 B.R. 39, 62 (S.D.N.Y. 2018) (law of the case doctrine applies across adversary proceedings within the same main case), *aff’d*, 943 F.3d 125 (2d Cir. 2019)); *Perez v. Terrastar Corp. (In re Terrestar Corp.)*, No. 16 Civ. 1421 (ER), 2017 WL 1040448, at \*4 (S.D.N.Y. Mar. 16, 2017) (“Adversary proceedings filed in the same bankruptcy case do not constitute different cases.”), *appeal dismissed*, No. 17-1117 (2d Cir. June 29, 2017); *Bourdeau Bros., Inc. v. Montagne (In re Montagne)*, No. 08-1024 (CAB), 2010 WL 271347, at \*6 (Bankr. D. Vt. Jan. 22, 2010) (“[D]ifferent adversary proceedings in the same main case do not constitute different ‘cases.’”).

Some courts have worried that wholesale incorporation of a pleading can lead to “confusing and inconvenient” results. *Hinton v. Trans Union, LLC*, 654 F. Supp. 2d 440, 446–47 (E.D. Va. 2009) (footnote omitted), *aff’d*, 382 F. App’x 256 (4th Cir. 2010). That is not a concern in these proceedings. PIFSS, like many subsequent transfer defendants in this SIPA proceeding, is uniquely aware of what has been filed in the other adversary proceeding in this SIPA liquidation. It routinely follows what is happening on a proceeding-wide basis. *See* Stip., ECF No. 97 (dismissing adversary proceeding based on consolidated extraterritoriality ruling).

Allowing the Trustee to incorporate the Fairfield Amended Complaint by reference, does not prejudice the Defendant. On the other hand, dismissing this Complaint and permitting the Trustee to amend his Complaint to include all of the allegations that are already contained in the Fairfield Amended Complaint, would prejudice all parties by delaying the already overly

prolonged proceedings. *See Picard v. Fairfield Inv. Fund (In re BLMIS)*, No. 08-01789 (CGM), Adv. No. 09-01239 (CGM), 2021 WL 3477479, at \*4 (Bankr. S.D.N.Y. Aug. 6, 2021) (“Rule 15 places no time bar on making motions to amend pleadings and permits the amending of pleadings “when justice so requires.”).

Through the adoption of the Fairfield Amended Complaint, the Trustee has adequately pleaded, with particularity, the avoidability of the initial transfer due to Fairfield Sentry’s knowledge of BLMIS’ fraud. (Fairfield Compl. ¶¶ 314–18, 09-01239, ECF No. 286); *see also SIPC v. BLMIS (In re Consolidated Proceedings on 11 U.S.C. § 550(a))*, 501 B.R. 26, 36 (S.D.N.Y. 2013) (“[T]he Court directs that the following adversary proceedings be returned to the Bankruptcy Court for further proceedings consistent with this Opinion and Order . . .”).

#### BLMIS Customer Property

The Trustee has pleaded that “[b]ased on the Trustee’s investigation to date, approximately \$30,00,000 of the money transferred from BLMIS to Fairfield Sentry was subsequently transferred by Fairfield Sentry to Defendant PIFSS.” Compl. ¶ 41, ECF No. 1. The parties later stipulated to dismissing recovery of one transfer in the amount of \$10,000,000. Stip., ECF 111.

The exhibits attached to the Complaint provide PIFSS with the “who, when, and how much” of each transfer. *Picard v. BNP Paribas S.A. (In re BLMIS)*, 594 B.R. 167, 195 (Bankr. S.D.N.Y. 2018); Compl., ECF No. 1, Ex. C (indicating the transfer in question occurred on January 21, 2004); *cf. Picard v. Shapiro (In re BLMIS)*, 542 B.R. 100, 119 (Bankr. S.D.N.Y. 2015) (dismissing for failure to plausibly imply that the initial transferee made any subsequent transfers.). The Fairfield Amended Complaint, which is incorporated by reference into this, alleges that the Fairfield Fund was required to invest 95% of its assets in BLMIS. Fairfield

Compl. ¶ 89; *see also* Fairfield Compl. ¶ 91 (“From the beginning, to comport with Madoff’s requirement for BLMIS feeder funds, Fairfield Sentry ceded control of not only its investment decisions, but also the custody of its assets, to BLMIS.”). The Trustee need not prove the path that each transfer took from BLMIS to Fairfield Sentry and subsequently to each redeeming shareholder. The Complaint plausibly alleges that Fairfield Sentry did not have any assets that were not customer property.

Taking all allegations as true and reading them in a light most favorable to the Trustee, the Complaint plausibly pleads that PIFSS received customer property because Fairfield Sentry did not have other property to give. The calculation of Fairfield Sentry’s customer property and what funds it used to make redemption payments are issues of fact better resolved at a later stage of litigation.

#### **Section 546(e)**

The Defendant has raised the “safe harbor” defense, found in 11 USC § 546(e), to the Trustee’s allegations. Section 546(e) is referred to as the safe harbor because it protects a transfer that is a “settlement payment ... made by or to (or for the benefit of) a ... financial institution [or] financial participant,” or that is “made by or to (or for the benefit of) a ... financial institution [or] financial participant ... in connection with a securities contract.” 11 U.S.C. § 546(e). “By its terms, the safe harbor is a defense to the avoidance of the **initial** transfer. *Picard v. BNP Paribas S.A. (In re BLMIS)*, 594 B.R. 167, 197 (Bankr. S.D.N.Y. 2018) (emphasis added). However, where the initial transferee fails to raise a § 546(e) defense against the Trustee’s avoidance of certain transfers, as is the case here, the subsequent transferee is entitled to raise a § 546(e) defense against recovery of those funds. *Picard v. Fairfield Inv. Fund (In re*

*BLMIS*), No. 08-01789 (CGM), Adv. No. 09-01239 (CGM), 2021 WL 3477479, at \*3 (Bankr. S.D.N.Y. Aug. 6, 2021).

In light of the safe harbor granted under 11 U.S.C. § 546(e), the Trustee may only avoid and recover intentional fraudulent transfers under § 548(a)(1)(A) made within two years of the filing date, unless the transferee had actual knowledge of BLMIS's Ponzi scheme, or more generally, "actual knowledge that there were no actual securities transactions being conducted." *SIPC v. BLMIS (In re Consolidated Proceedings on 11 U.S.C. § 546(e))*, No. 12 MC 115(JSR), 2013 WL 1609154, at \*4 (S.D.N.Y. Apr. 15, 2013). "The safe harbor was intended, among other things, to promote the reasonable expectations of legitimate investors. If an investor knew that BLMIS was not actually trading securities, he had no reasonable expectation that he was signing a contract with BLMIS for the purpose of trading securities for his account. In that event, the Trustee can avoid and recover preferences and actual and constructive fraudulent transfers to the full extent permitted under state and federal law." *Picard v. Legacy Capital Ltd. (In re BLMIS)*, 548 B.R. 13, 28 (Bankr. S.D.N.Y. 2016) (internal citations omitted), *vacated and remanded on other grounds, Picard v. Citibank, N.A. (In re BLMIS)*, 12 F.4th 171 (2d Cir. 2021)). "In sum, if the Trustee sufficiently alleges that the [initial] transferee from whom he seeks to recover a fraudulent transfer knew of [BLMIS]'s fraud, that transferee cannot claim the protections of Section 546(e)'s safe harbor." *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, No. 08-01789 (CGM), 2021 WL 3477479, at \*4 (Bankr. S.D.N.Y. Aug. 6, 2021).

This Court has already determined that the Fairfield Amended Complaint contains sufficient allegations of Fairfield Sentry's actual knowledge to defeat the safe harbor defense on a Rule 12(b)(6) motion. *See Picard v. Fairfield Inv. Fund (In re BLMIS)*, No. 08-01789 (CGM), Adv. No. 09-01239 (CGM), 2021 WL 3477479, at \*4 (Bankr. S.D.N.Y. Aug. 6, 2021) ("[T]he

Trustee has alleged that the agents and principals of the Fairfield Funds had actual knowledge of Madoff's fraud"). In that adversary proceeding, the Court held that "[t]he Trustee has pled [actual] knowledge in two ways: 1) that certain individuals had actual knowledge of Madoff's fraud, which is imputed to the Fairfield Funds; and 2) that actual knowledge is imputed to the Fairfield Funds through 'FGG,' an alleged 'de facto' partnership." *Id.* at \*4; *see also* Fairfield Compl. ¶ 320 ("Fairfield Sentry had actual knowledge of the fraud at BLMIS"); Fairfield Compl. ¶ 321 ("Greenwich Sentry and Greenwich Sentry Partners had actual knowledge of the fraud at BLMIS"); Fairfield Compl. ¶ 322 ("FIFL had actual knowledge of the fraud at BLMIS"); Fairfield Compl. ¶ 323 ("Stable Fund had actual knowledge of the fraud at BLMIS"); Fairfield Compl. ¶ 324 ("FG Limited had actual knowledge of the fraud at BLMIS"); Fairfield Compl. ¶ 325 ("FG Bermuda had actual knowledge of the fraud at BLMIS"); ¶ 326 ("FG Advisors had actual knowledge of the fraud at BLMIS"); Fairfield Compl. ¶ 327 ("Fairfield International Managers had actual knowledge of the fraud at BLMIS"); Fairfield Compl. ¶ 328 ("FG Capital had actual knowledge of the fraud at BLMIS"); Fairfield Compl. ¶ 329 ("Share Management had actual knowledge of the fraud at BLMIS"); Fairfield Compl. ¶ 9 ("It is inescapable that FGG partners knew BLMIS was not trading securities. They knew BLMIS's returns could not be the result of the split strike conversion strategy (the "SSC Strategy"). They knew BLMIS's equities and options trading volumes were impossible. They knew that BLMIS reported impossible, out-of-range trades, which almost always were in Madoff's favor. They knew Madoff's auditor was not certified and lacked the ability to audit BLMIS. They knew BLMIS did not use an independent broker or custodian. They knew Madoff refused to identify any of BLMIS's options counterparties. They knew their clients and potential clients raised numerous due diligence questions they would not and could not satisfactorily answer. They knew Madoff would refuse to

provide them with honest answers to due diligence questions because it would confirm the details of his fraud. They knew Madoff lied about whether he traded options over the counter or through the exchange. They knew they lied to clients about BLMIS's practices in order to keep the money flowing and their fees growing. And they knowingly misled the SEC at Madoff's direction.").

This Court determined that the Fairfield Amended Complaint is replete with allegations demonstrating that Fairfield Sentry had actual knowledge that BLMIS was not trading securities. *See Picard v. Fairfield Inv. Fund (In re BLMIS)*, No. 08-01789(CGM), Adv. No. 09-01239 (CGM), 2021 WL 3477479, at \*3–\*7 (Bankr. S.D.N.Y. Aug. 6, 2021). The district court determined that “those defendants who claim the protections of Section 546(e) through a Madoff Securities account agreement but who actually knew that Madoff Securities was a Ponzi scheme are not entitled to the protections of the Section 546(e) safe harbor, and their motions to dismiss the Trustee’s claims on this ground must be denied. *SIPC v. BLMIS (In re Consolidated Proceedings on 11 U.S.C. § 546(e))*, No. 12 MC 115(JSR), 2013 WL 1609154, at \*10 (S.D.N.Y. Apr. 15, 2013). And “to the extent that a defendant claims protection under Section 546(e) under a separate securities contract” this Court was directed to “adjudicate those claims in the first instance consistent with [the district court’s] opinion.” *See* Order, 12-MC-115, ECF No. 119, Ex. A at 24.

This Court is powerless to reconsider this issue, agrees with the district court’s reasoning, and finds its holding consistent with *dicta* set forth by the Court of Appeals for the Second Circuit. *See Picard v. Ida Fishman Revocable Trust (In re Bernard L. Madoff Inv. Sec. LLC)*, 773 F.3d 411, 420 (2d Cir. 2014) (“The clawback defendants, having every reason to believe that BLMIS was actually engaged in the business of effecting securities transactions, have every right

to avail themselves of all the protections afforded to the clients of stockbrokers, including the protection offered by § 546(e).”). The Trustee’s allegations in the Fairfield Amended Complaint are sufficient to survive a Rule 12(b)(6) motion on this issue.

The Safe Harbor Cannot be Used to Defeat a Subsequent Transfer

The Defendant argues that the safe harbor prevents the Trustee from avoiding the subsequent transfer between Fairfield Sentry and PIFSS on account of the securities contract between Fairfield and the Defendant.

The safe harbor is not applicable to subsequent transfers. “By its terms, the safe harbor is a defense to the avoidance of the *initial* transfer.” *Picard v. BNP Paribas S.A. (In re BLMIS)*, 594 B.R. 167, 197 (Bankr. S.D.N.Y. 2018) (emphasis in original); *see also* 11 U.S.C. § 546(e) (failing to include § 550 in its protections). Since there must be an initial transfer in order for the Trustee to collect against a subsequent transferee, a subsequent transferee may raise the safe harbor as a defense—but only in so far as the avoidance of the initial transfer is concerned. The safe harbor cannot be used as a defense by the subsequent transferee because the Trustee is not “avoiding” a subsequent transfer, “he recovers the value of the avoided initial transfer from the subsequent transferee under 11 U.S.C. § 550(a), and the safe harbor does not refer to the recovery claims under section 550.” *Picard v. BNP Paribas S.A. (In re BLMIS)*, 594 B.R. 167, 197 (Bankr. S.D.N.Y. 2018).

The Defendant’s reliance on *SIPC v. BLMIS (In re Consolidated Proceedings on 11 U.S.C. § 546(e))*, No. 12 MC 115(JSR), 2013 WL 1609154, at \*7 (S.D.N.Y. Apr. 15, 2013) (“Cohmad”) is unavailing. In *Cohmad*, Judge Rakoff clearly laid out the “one caveat” to the general rule that the Trustee must show “the initial transfer of . . . by the debtor is subject to avoidance under one of the Bankruptcy Code’s avoidance provisions.” *Id.* That is, a subsequent

transferee with actual knowledge of the fraud “cannot prevail on a motion to dismiss on the basis of Section 546(e)'s safe harbor.” *Id.* This caveat only pertains to a subsequent transferee with actual knowledge. It is the “one caveat.” *Id.* *Cohmad* did not “leave open” any additional caveats to subsequent transferees who lack actual knowledge.

The Defendant argues that this Court applied the safe harbor to redemption payments made by Fairfield Sentry in *In re Fairfield Sentry Ltd.*, 2020 WL 7345988, at \*5 (Dec. 14, 2020) (“*Fairfield III*”). Reliance on this case is misplaced. While many facts overlap between this SIPA liquidation of BLMIS and the foreign liquidation of BLMIS’s largest feeder fund, Fairfield Sentry, the legal holdings in these liquidations are not interchangeable. In this case, the Court is analyzing subsequent transfers; in *Fairfield III* the Court was analyzing initial transfers. The safe harbor is not available to be raised as defense to subsequent transfer claims.

In *Fairfield III*, this Court analyzed whether the safe harbor applied to avoidance claims under BVI law<sup>2</sup> to recover “unfair preferences” and “undervalue transactions” and constructive trust claims against a defendant who allegedly “knew or willfully blinded itself to the fact that the [Fairfield Sentry’s] BLMIS investments were worthless or virtually worthless.” *In re Fairfield Sentry Ltd.*, No. 10-13164 (SMB), 2020 WL 7345988, at \*1 (Bankr. S.D.N.Y. Dec. 14, 2020), *reconsideration denied*, No. 10-13164 (SMB), 2021 WL 771677 (Bankr. S.D.N.Y. Feb. 23, 2021). The Court was not considering the safe harbor’s effect on subsequent transfer claims brought under § 550 of the Bankruptcy Code. In the Fairfield Sentry liquidation, Defendant would be an initial transferee as redemption payments paid by Fairfield Sentry were paid directly to the Defendant. *Fairfield III* is not applicable here.

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<sup>2</sup> Fairfield Sentry liquidated under the laws of the British Virgin Islands (“BVI”) and this Court’s chapter 15 case is ancillary to the primary proceeding brought in the BVI.

Defendant is not permitted to raise the safe harbor defense on its own behalf as a subsequent transferee.

### **The Motion to Strike**

The Defendant seeks to strike the declaration by Brian Song and the attached exhibits for lacking a basis in personal knowledge, lacking foundation, hearsay, failure to authenticate, and lack of relevance. The Court of Appeals for the Second Circuit has “long made clear” that a court has “considerable procedural leeway” in deciding a pretrial motion to dismiss for lack of personal jurisdiction. *Dorchester Fin. Sec, Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 84 (2d Cir. 2013). The Court “may determine the motion on the basis of affidavits alone; or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion.” *Id.* (quoting *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981)). “Prior to discovery, a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith.” *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir. 1990).

It is only after discovery that the prima facie showings should be factually supported with admissible evidence. *Id.*; *Astor Chocolate Corp. v. Elite Gold Ltd.*, 510 F. Supp. 3d 108, 121 (S.D.N.Y. 2020) “[A] court, in resolving a Rule 12(b)(2) motion ***made after jurisdictional discovery***, may consider only admissible evidence.”) (emphasis added). Even at that later stage, the Court may consider evidence that is not presented in admissible form. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (rejecting the argument that “the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment”).

The Defendant has not shown that the exhibits are ultimately inadmissible. Arguments as to the lack of foundation and hearsay nature of the exhibits are premature.

At this stage of the proceedings, counsel may submit a sworn statement including facts and exhibits. *Knowyourmeme.com Network v. Nizri*, No. 20-CV-9869 (GBD) (JLC), 2021 WL 3855490, at \*9 (S.D.N.Y. Aug. 30, 2021); *see also Kulhawik v. Holder*, 571 F.3d 296, 298 (2d Cir. 2009) ([W]hen an attorney makes statements under penalty of perjury in an affidavit or an affirmation, the statements do constitute part of the evidentiary record and must be considered."). "While bone fide evidentiary objections can and should be considered at the summary judgment stage . . . the fact that documents were attached to an attorney declaration without a supplemental affidavit by a document custodian or another with knowledge does not make them inadmissible for that reason." *Ball v. Soundview Composite Ltd. (In re Soundview Elite Ltd.)*, 543 B.R. 78, 100 (Bankr. S.D.N.Y. 2016).

The Defendant has not challenged the ultimate credibility of the Song Declaration and attached exhibits. The Court will not strike any part of the Song Declaration or attached exhibits for lack of authentication.

While personal jurisdiction can be established from the Complaint alone, the Song Declaration and attached exhibits are relevant to the Trustee's claims. Evidence is relevant where "it has any tendency to make a fact more or less probable than it would be without the evidence" and where "the fact is of consequence in determining the action." Fed. R. Evid. 401. "When sought to expunge irrelevant factual matters, a strike motion will not be granted unless those matters have no clear bearing on the issues in dispute." *Yankees Entm't & Sports Network, LLC v. Cablevision Sys. Corp.*, 224 F. Supp. 2d 657, 676 (S.D.N.Y. 2002) (citing *Reiter's Beer Distributors, Inc. v. Schmidt Brewing Co.*, 657 F. Supp. 136, 143 (E.D.N.Y. 1987) ("Motions to

strike are generally disfavored and will not be granted unless the matter asserted clearly has no bearing on the issue in dispute.”))

The exhibits attached to the Song Declaration may bear on the issues in dispute. The exhibits contain information that investors in Fairfield Sentry were given (Song Decl., Ex. 1); records of PIFSS’s subscriptions and redemptions with Fairfield Sentry (Ex. 2–6); and emails showing meetings between the Fairfield Greenwich Group and PIFSS or its subsidiary, Wafra. (Ex. 7–13). These matters are closely related to establishing personal jurisdiction over the Defendant.

The Trustee has made sufficient allegations concerning personal jurisdiction in the Complaint. Compl., ECF No. 1. While these allegations are sufficient by themselves to establish jurisdiction, the Trustee has provided further allegations in the opposition to the motion to dismiss with the Song Declaration and attached exhibits. Opp’n, ECF No. 122; Song Decl., ECF No. 123. The Court will not strike the Song Declaration or attached exhibits.

### **Conclusion**

For the foregoing reasons, PIFSS’s motion to dismiss and motion to strike are denied. The Trustee shall submit a proposed order within fourteen days of the issuance of this decision, directly to chambers (via E-Orders), upon not less than two days’ notice to all parties, as required by Local Bankruptcy Rule 9074-1(a).

**Dated: August 17, 2022**  
**Poughkeepsie, New York**



**/s/ Cecelia G. Morris**

**Hon. Cecelia G. Morris**  
**U.S. Bankruptcy Judge**

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Sheet Pg 1 of 2

JS 44C/SDNY  
REV.  
10/01/2020

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for use of the Clerk of Court for the purpose of initiating the civil docket sheet.

**PLAINTIFFS**

IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff  
Investment Securities LLC

**DEFENDANTS**

THE PUBLIC INSTITUTION FOR SOCIAL SECURITY

**ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)**

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**CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE)**  
(DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)

28 U.S.C. § 158 -- Appeal from Bankruptcy Court's denial of motion to dismiss adversary proceeding

Has this action, case, or proceeding, or one essentially the same been previously filed in SDNY at any time? No ☐ Yes ☒ Judge Previously Assigned  
Hon. Jed. S. Rakoff

If yes, was this case Vol. ☐ Invol. ☐ Dismissed. No ☒ Yes ☐ If yes, give date \_\_\_\_\_ & Case No. 12-mc-115

IS THIS AN INTERNATIONAL ARBITRATION CASE?

No ☐ Yes ☐

(PLACE AN [x] IN ONE BOX ONLY)

**NATURE OF SUIT**

**TORTS**

**ACTIONS UNDER STATUTES**

**CONTRACT**

☐ 110 INSURANCE  
☐ 120 MARINE  
☐ 130 MILLER ACT  
☐ 140 NEGOTIABLE INSTRUMENT  
☐ 150 RECOVERY OF OVERPAYMENT & ENFORCEMENT OF JUDGMENT  
☐ 151 MEDICARE ACT  
☐ 152 RECOVERY OF DEFAULTED STUDENT LOANS (EXCL VETERANS)  
☐ 153 RECOVERY OF OVERPAYMENT OF VETERAN'S BENEFITS  
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☐ 190 OTHER CONTRACT  
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☐ 330 FEDERAL EMPLOYERS' LIABILITY  
☐ 340 MARINE  
☐ 345 MARINE PRODUCT LIABILITY  
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☐ 355 MOTOR VEHICLE PRODUCT LIABILITY  
☐ 360 OTHER PERSONAL INJURY  
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☐ 441 VOTING  
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☐ 840 TRADEMARK

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☐ 720 LABOR/MGMT RELATIONS  
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☐ 751 FAMILY MEDICAL LEAVE ACT (FMLA)  
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☐ 862 BLACK LUNG (923)  
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☐ 210 LAND  
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☐ 230 RENT LEASE & EJECTMENT  
☐ 240 TORTS TO LAND  
☐ 245 TORT PRODUCT LIABILITY  
☐ 290 ALL OTHER REAL PROPERTY

Check if demanded in complaint:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DO YOU CLAIM THIS CASE IS RELATED TO A CIVIL CASE NOW PENDING IN S.D.N.Y. AS DEFINED BY LOCAL RULE FOR DIVISION OF BUSINESS 13?

IF SO, STATE:

DEMAND \$20,000,000 OTHER \_\_\_\_\_ JUDGE Hon. Jed. S. Rakoff DOCKET NUMBER 12-mc-115 and

Check YES only if demanded in complaint  
JURY DEMAND: ☐ YES ☒ NO

22-cv-6502-JSR; 22-cv-6512-JSR; 22-cv-7195-JSR; 22-cv-7189-JSR; 22-cv-7173-JSR; 22-cv-7372-JSR; 22-cv-7788-JSR; 22-cv-6561-LGS

NOTE: You must also submit at the time of filing the Statement of Relatedness form (Form IH-32).

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Sheet Pg 2 of 2

(PLACE AN x IN ONE BOX ONLY)

ORIGIN

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from (Specify District) ☐ 6 Multidistrict Litigation (Transferred) ☐ 7 Appeal to District Judge from Magistrate Judge ☐ 8 Multidistrict Litigation (Direct File)
- ☐ a. all parties represented ☐ b. At least one party is pro se.

(PLACE AN x IN ONE BOX ONLY)

BASIS OF JURISDICTION

IF DIVERSITY, INDICATE  
CITIZENSHIP BELOW.

- ☐ 1 U.S. PLAINTIFF ☐ 2 U.S. DEFENDANT ☒ 3 FEDERAL QUESTION ☐ 4 DIVERSITY  
(U.S. NOT A PARTY)

CITIZENSHIP OF PRINCIPAL PARTIES (FOR DIVERSITY CASES ONLY)

(Place an [X] in one box for Plaintiff and one box for Defendant)

CITIZEN OF THIS STATE	PTF [ ] 1	DEF [ ] 1	CITIZEN OR SUBJECT OF A FOREIGN COUNTRY	PTF DEF [ ] 3 [ ] 3	INCORPORATED and PRINCIPAL PLACE OF BUSINESS IN ANOTHER STATE	PTF DEF [ ] 5 [ ] 5
CITIZEN OF ANOTHER STATE	[ ] 2	[ ] 2	INCORPORATED or PRINCIPAL PLACE OF BUSINESS IN THIS STATE	[ ] 4 [ ] 4	FOREIGN NATION	[ ] 6 [ ] 6

PLAINTIFF(S) ADDRESS(ES) AND COUNTY(IES)

Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC and the  
Chapter 7 Estate of Bernard L. Madoff  
c/o Baker & Hostetler LLP  
45 Rockefeller Plaza, New York, NY 10111

DEFENDANT(S) ADDRESS(ES) AND COUNTY(IES)

The Public Institution for Social Security  
Al Murqab - Block 1 - Al Soor Street  
Kuwait City, Kuwait

DEFENDANT(S) ADDRESS UNKNOWN

REPRESENTATION IS HEREBY MADE THAT, AT THIS TIME, I HAVE BEEN UNABLE, WITH REASONABLE DILIGENCE, TO ASCERTAIN  
THE RESIDENCE ADDRESSES OF THE FOLLOWING DEFENDANTS:

COURTHOUSE ASSIGNMENT

I hereby certify that this case should be assigned to the courthouse indicated below pursuant to Local Rule for Division of Business 18, 20 or 21.

Check one: THIS ACTION SHOULD BE ASSIGNED TO: ☐ WHITE PLAINS ☒ MANHATTAN

/s/ Leo Muchnik  
DATE 10/6/2022

SIGNATURE OF ATTORNEY OF RECORD

RECEIPT #

ADMITTED TO PRACTICE IN THIS DISTRICT

[ ] NO

☒ YES (DATE ADMITTED Mo. April Yr. 2013)

Attorney Bar Code # LM1219

Magistrate Judge is to be designated by the Clerk of the Court.

Magistrate Judge \_\_\_\_\_ is so Designated.

Ruby J. Krajick, Clerk of Court by \_\_\_\_\_ Deputy Clerk, DATED \_\_\_\_\_

UNITED STATES DISTRICT COURT (NEW YORK SOUTHERN)

United States District Court  
for the  
Southern District of New York  
Related Case Statement

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Full Caption of Later Filed Case:

IRVING H. PICARD, Trustee for the  
Liquidation of Bernard L. Madoff  
Investment Securities LLC

Plaintiff	Case Number
vs.	Bankruptcy Court Adv. Pro. No. 12-01002
THE PUBLIC INSTITUTION FOR SOCIAL SECURITY	
Defendant	

Full Caption of Earlier Filed Case:

(including in bankruptcy appeals the relevant adversary proceeding)

IRVING H. PICARD, Trustee for the  
Liquidation of Bernard L. Madoff  
Investment Securities LLC

Plaintiff	Case Number
vs.	12-mc-115;
(1) Bernard L. Madoff Investment Securities LLC (12-mc-115); (2) Multi-Strategy Fund Ltd (22-cv-6502-JSR (Adv. Pro. No. 12-01205)); (3) Banque Syz & Co., SA (22-cv-6512-JSR (Adv. Pro. No. 12-02149)); (4) Bordier & Cie (22-cv-7195-JSR (Adv. Pro. No. 12-01695)); (5) Banque Cantonale Vaudoise (22-cv-7189-JSR (Adv. Pro. No. 12-01694)); (6) Lloyds TSB Bank PLC (22-cv-7173-JSR (Adv. Pro. No. 12-01207)); (7) Barclays Bank (Suisse) S.A. (22-cv-7372-JSR (Adv. Pro. No. 12-02569)); (8) Delta National Bank and Trust (22-cv-7788-JSR (Adv. Pro. No. 11-02551)); (9) Banque Lombard Odier & Cie SA (22-cv-6561-LGS (Adv. Pro. No. 12-01693))	22-cv-6502-JSR (Adv. Pro. No. 12-01205); 22-cv-6512-JSR (Adv. Pro. No. 12-02149); 22-cv-7195-JSR (Adv. Pro. No. 12-01695); 22-cv-7189-JSR (Adv. Pro. No. 12-01694); 22-cv-7173-JSR (Adv. Pro. No. 12-01207); 22-cv-7372-JSR (Adv. Pro. No. 12-02569); 22-cv-7788-JSR (Adv. Pro. No. 11-02551); 22-cv-6561-LGS (Adv. Pro. No. 12-01693)
Defendant	

12-01002-cgm Doc 154-4 Filed 10/06/22 Entered 10/06/22 17:43:57 Related Case  
Statement Pg 2 of 2

IH-32

Rev: 2014-1

Status of Earlier Filed Case:

☐

Closed

(If so, set forth the procedure which resulted in closure, e.g., voluntary dismissal, settlement, court decision. Also, state whether there is an appeal pending.)

☒

Open

(If so, set forth procedural status and summarize any court rulings.)

Case (1) is a closed case in which Judge Rakoff withdrew the reference to the Bankruptcy Court in related adversary proceedings brought by Irving Picard as trustee for the liquidation of Bernard L. Madoff Investment Securities LLC ("Trustee"). Judge Rakoff issued a decision (2013 WL 1609154 (Apr. 15, 2013) ("Cohmad")) re: the application of Bankruptcy Code § 546(e). Cases (2)-(8) are open cases that, like this appeal, directly relate to Bankruptcy Court's interpretation of Cohmad. These cases, all assigned to Judge Rakoff, have pending motions for leave to appeal Bankruptcy Court orders filed by defendants in adversary proceedings brought by Trustee. Case (9) is an open case in which, like in this appeal, a defendant in an adversary proceeding brought by Trustee is seeking to appeal the Bankruptcy Court's holding that it has personal jurisdiction.

Explain in detail the reasons for your position that the newly filed case is related to the earlier filed case.

The newly filed case is an appeal from a September 2022 order of the Bankruptcy Court in a Madoff adversary proceeding for which the reference to the Bankruptcy Court was previously withdrawn, assigned to Judge Rakoff in the District Court, and then returned to the Bankruptcy Court with instructions from Judge Rakoff in the Cohmad case identified above.

This appeal presents two jurisdictional issues and one issue concerning the standard for an affirmative defense: (a) whether the Bankruptcy Court erred in holding that Defendant The Public Institution for Social Security ("PIFSS"), an agency of the government of Kuwait, is not immune from suit under the Foreign Sovereign Immunities Act ("FSIA"); (b) whether the Bankruptcy Court erred in finding that PIFSS is subject to the court's personal jurisdiction; and (c) whether the Bankruptcy Court erred in its application of Judge Rakoff's decision in Cohmad.

As to the jurisdictional issues (Issues (a) and (b)):

Issue (a): The issue of whether the Bankruptcy Court erred in finding it has subject matter jurisdiction based on its analysis PIFSS' right to sovereign immunity under the FSIA is unique to this case.

Issue (b): This case presents the same legal issue that was raised in the motion for leave to appeal filed in Case (9), which asks whether the Bankruptcy Court erred in its application of recent Supreme Court precedent setting forth the standard for assessing the sufficiency of a defendant's contacts with the forum when analyzing personal jurisdiction. Case (9) has already been assigned to Judge Schofield.

As to PIFSS' defense under Section 546(e), Issue (c): This case presents the same legal issue that was raised in the motions for leave to appeal filed in Cases (2)-(8). This appeal requires the District Court to interpret Judge Rakoff's decision in Cohmad and, consequently, Cases (2)-(8) have already been assigned to Judge Rakoff. A hearing is scheduled on the motions for leave to appeal on October 13, 2022 before Judge Rakoff.

Signature: /s/ Leo Muchnik

Date: 10/6/2022

Greenberg Traurig, LLP

Firm: \_\_\_\_\_

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Email: [Alison.Holdway@gtlaw.com](mailto:Alison.Holdway@gtlaw.com)

*Attorneys for Defendant The Public Institution for Social Security*

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES INVESTOR  
PROTECTION CORPORATION,

Plaintiff-Applicant,

v.

BERNARD L. MADOFF  
INVESTMENT SECURITIES LLC,

Defendant.

S.D.N.Y. Case No. \_\_\_\_\_

Adv. Pro. No. 08-01789 (CGM)

SIPA LIQUIDATION

(Substantively Consolidated)

In re:

BERNARD L. MADOFF,

Debtor.

IRVING H. PICARD, Trustee for the  
Liquidation of Bernard L. Madoff  
Investment Securities LLC, and  
Bernard L. Madoff,

Plaintiff,

v.

THE PUBLIC INSTITUTION FOR  
SOCIAL SECURITY,

Defendant.

Adv. Pro. No. 12-01002 (CGM)

**DEFENDANT THE PUBLIC INSTITUTION FOR  
SOCIAL SECURITY'S MOTION FOR LEAVE TO APPEAL**

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 8012 of the Federal Rules of Bankruptcy Procedure,  
Defendant The Public Institution for Social Security, by and through its undersigned  
counsel, states that it is governmental institution of the State of Kuwait.

Dated: October 6, 2022

/s/ Leo Muchnik  
Leo Muchnik

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**STATEMENT REGARDING ORAL ARGUMENT**

Defendant The Public Institution for Social Security supports oral argument to the extent that the Court deems it helpful in assessing the issues raised in this motion for leave to appeal.

Defendant The Public Institution for Social Security (“PIFSS”), a governmental agency of Kuwait, hereby moves pursuant to 28 U.S.C. § 158(a)(1), (3) and Fed. R. Bankr. P. 8004 for leave to appeal from an order (“Order”) of the United States Bankruptcy Court for the Southern District of New York (“Bankruptcy Court”) denying PIFSS’ motion to dismiss the Complaint (ECF No. 1) of plaintiff Irving H. Picard (“Trustee”), as trustee for the liquidation of Bernard L. Madoff Investment Securities LLC (“BLMIS”).<sup>1</sup> PIFSS seeks to appeal three rulings in the Order: (1) that PIFSS is not entitled to sovereign immunity under the Foreign Sovereign Immunities Act (“FSIA”), (2) that PIFSS is subject to the court’s personal jurisdiction, and (3) that this Court’s decision in *In re Madoff Sec.*, 2013 WL 1609154 (S.D.N.Y. Apr. 15, 2013) (“Cohmad”) bars PIFSS, a subsequent transferee, from invoking the Bankruptcy Code Section 546(e) safe harbor defense because the initial transferee allegedly knew that BLMIS was not selling securities even though PIFSS was unaware.

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<sup>1</sup> “ECF No. \_\_” refers to filings on the Bankruptcy Court docket in Adversary Proceeding No. 12-01002.

The Order (ECF No. 150) was entered on September 1, 2022; a copy is attached hereto as **Exhibit A**. The Bankruptcy Court entered its Memorandum of Decision (ECF No. 149) on August 17, 2022; a copy is attached hereto as **Exhibit B**. On September 12, 2022, the Bankruptcy Court entered an order (ECF No. 153) extending PIFSS’ time to file its notice of appeal and any motion required under 28 U.S.C. § 158 to October 6, 2022.

### **PRELIMINARY STATEMENT**

It is undisputed that PIFSS is a “foreign state” under the FSIA and presumptively immune from suit. PIFSS is the governmental agency that manages Kuwait’s social security program. It provides Kuwaitis with sustainable insurance and social services, ensuring that Kuwaitis have a decent living and long-term benefits.

PIFSS invested with Fairfield Sentry Limited (“Sentry”), a British Virgin Islands entity. Sentry, in turn, allocated its assets to an account with BLMIS, and BLMIS managed the account and executed investment strategies. Although PIFSS fell victim to Madoff’s Ponzi scheme, Trustee sued PIFSS and seeks to recover a single \$20 million transfer from Sentry because the proceeds allegedly constitute BLMIS customer property.

First, even though PIFSS is a foreign state, the Bankruptcy Court held that PIFSS was not immune from suit because the third clause of the commercial activity exception under 28 U.S.C. § 1605(a)(2)—which permits suit against a foreign state based upon an act taken by the foreign state in connection with commercial activity abroad that has a direct effect in the U.S.—applied. The Bankruptcy Court found that PIFSS’ subscription into and redemption out of Sentry was commercial activity outside the U.S. that caused a direct effect in the U.S. because of the two-way flow of funds between BLMIS, a New York entity, and Sentry. In reaching this

conclusion, the Bankruptcy Court applied the wrong legal standard, choosing to follow the decision by another bankruptcy court rather than more recent Supreme Court precedent. As discussed below, application of the FSIA is an issue of subject matter jurisdiction and the collateral order doctrine permits direct appeal of the Bankruptcy Court's FSIA holding.

Second, the Bankruptcy Court adopted an unprecedented test for personal jurisdiction. The Bankruptcy Court determined it had personal jurisdiction over PIFSS despite the absence of any well-pled U.S. contacts *by PIFSS*. Instead, the Bankruptcy Court adopted a broad and erroneous standard that allegations of PIFSS' investments in Sentry, a foreign fund, outside the U.S. constituted contacts with the U.S. because PIFSS allegedly knew that Sentry would invest with BLMIS in the U.S. This Court should grant leave for PIFSS to appeal that decision, which conflicts with Supreme Court precedent instructing courts to consider only the defendant's claim-related contacts with the forum and disregard third-party contacts. Resolving the personal jurisdictional question would advance this adversary proceeding and conserve resources by providing appellate guidance on this potentially dispositive issue.

Third, the Bankruptcy Court misapplied this Court's holding in *Cohmad*. There, the Court held that a transferee's actual knowledge of Madoff's fraud precluded *that transferee*, initial or subsequent, from invoking Section 546(e). 2013

WL 1609154, at \*4, \*7. The Court also held that Section 546(e) could shield an initial transfer from BLMIS if it was made on account of a securities contract between the initial and subsequent transferees. *Id.* at \*9. The Bankruptcy Court, citing *Cohmad*, erred by holding that Sentry's (the initial transferee) knowledge of BLMIS' fraud barred PIFSS from invoking Section 546(e). Decision at 21–23. *Cohmad*, however, did not address the applicability of Section 546(e) to an innocent subsequent transferee (PIFSS) asserting the defense to an initial transfer when the initial transferee (Sentry) failed to raise it. *Cohmad*, 2013 WL 1609154, at \*1, \*9–10.

This Court should grant leave for PIFSS to appeal the Bankruptcy Court's interpretation of *Cohmad*. This is a controlling question of law about which there is substantial ground for difference in opinion, whose resolution in PIFSS' favor would result in the termination of this and dozens of subsequent transferee actions Trustee brought against Sentry's investors.

### **QUESTIONS PRESENTED**

1. Whether the Bankruptcy Court erred in holding that it had subject matter jurisdiction pursuant to the third clause of the FSIA's commercial activity exception.
2. Whether the Bankruptcy Court erred in holding that PIFSS is subject to personal jurisdiction in the United States.

3. Whether the Bankruptcy Court erred in interpreting *Cohmad* to bar a subsequent transferee from asserting a Section 546(e) defense if the initial transferee is alleged to have had actual knowledge of Madoff's fraud, even though the subsequent transferee is not alleged to have had such knowledge and/or where the initial transfer was on account of a separate securities contract between the initial and subsequent transferees.

### **RELEVANT BACKGROUND**<sup>2</sup>

On January 5, 2012, Trustee filed the Complaint against PIFSS for recovery pursuant to Section 550(a) of the Bankruptcy Code. Compl. ¶ 47. Trustee alleges that PIFSS was a subsequent transferee of purported BLMIS customer property. *Id.* ¶¶ 4, 46. The Complaint contains minimal allegations specific to PIFSS, instead focusing almost entirely on Madoff's Ponzi scheme. The Complaint contains no allegation that PIFSS had knowledge of Madoff's fraud.

The Complaint seeks to recover two transfers that PIFSS purportedly received from Sentry: (i) \$10 million on April 14, 2003, and (ii) \$20 million on January 21, 2004. Compl. ¶ 2, at Ex. C. Trustee dismissed with prejudice his claim regarding the \$10 million transfer because he failed to plead that there was an initial, avoidable

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<sup>2</sup> For purposes of this Motion only, PIFSS takes the Complaint's factual allegations—but not legal or boilerplate conclusions couched as factual allegations—as true. PIFSS does not admit factual allegations and reserves all rights to contest any such factual allegations that are false or inaccurate at the appropriate stage of the case.

transfer from BLMIS to Sentry. ECF No. 111. Accordingly, the remaining claim relates to only the \$20 million transfer (“Transfer”).

On February 25, 2022, PIFSS moved to dismiss the Complaint under Fed. R. Civ. P. 12(b)(1), (b)(2), and (b)(6) (“Motion to Dismiss”). ECF Nos. 116–118.

Among other arguments, PIFSS argued:

- the Bankruptcy Court lacked subject matter jurisdiction as PIFSS, a Kuwaiti governmental agency, is immune from suit under the FSIA, *see* Memorandum of Law (“MOL”), ECF No. 118, at 8–11;
- the Bankruptcy Court lacked personal jurisdiction because PIFSS did not have sufficient minimum contacts with the U.S., *see id.* at 12–22; and
- Section 546(e)’s safe harbor applied to the initial transfers from BLMIS to Sentry, meaning that the Transfer was shielded from recovery, *see id.* at 27–34.

On April 26, 2022, Trustee filed an opposition and a supporting declaration from Attorney Brian W. Song with 13 exhibits (“Song Declaration and Exhibits”). ECF Nos. 122 and 123, respectively. On May 26, 2022, PIFSS moved to strike the Song Declaration and Exhibits (“Motion to Strike”), ECF Nos. 129–130, which the Bankruptcy Court denied, ECF Nos. 149–150.

On August 17, 2022, the Bankruptcy Court denied PIFSS’ Motion to Dismiss and Motion to Strike (“Decision”). ECF No. 149. As to the FSIA, the Bankruptcy Court found that third clause of the commercial activity exception applied. Under that clause, a foreign state is not immune from suit when the action is (1) based upon on an act outside the territory of the U.S., (2) taken in connection with commercial

activity of the foreign state elsewhere, and (3) that that act caused a direct effect in the U.S. *See* 28 U.S.C. § 1605(a)(2). The Bankruptcy Court determined that PIFSS’ subscription into and redemption out of Sentry was commercial activity outside the U.S. that caused a direct effect in the U.S. as the transaction was a two-way funds flow between Sentry and BLMIS. Decision at 7–8. Thus, the Bankruptcy Court held that PIFSS was not immune from suit.

Regarding personal jurisdiction, the Bankruptcy Court held that Trustee sufficiently alleged that PIFSS purposefully availed itself of the privilege of conducting business in the U.S. *Id.* at 9–14. The Bankruptcy Court primarily relied on an allegation in the Complaint that PIFSS “knowingly directed funds to be invested with” BLMIS, stating that this allegation “alone is sufficient to establish a prima facie showing of jurisdiction.” *Id.* at 9.<sup>3</sup>

Finally, the Bankruptcy Court held that Section 546(e) did not apply because it had previously “determined that the Fairfield Amended Complaint contains sufficient allegations of [] Sentry’s actual knowledge [of Madoff’s fraud] to defeat the safe harbor defense on a Rule 12(b)(6) motion.” *Id.* at 21–23 (citing *Picard v. Fairfield Inv. Fund (In re BLMIS)*, Adv. No. 09-01239, 2021 WL 3477479 (Bankr.

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<sup>3</sup> The Bankruptcy Court also noted that the Song Declaration and Exhibits evidenced connections with New York but explained that “even without the Song Declaration and attached exhibits, the Trustee has sufficiently plead allegations supporting jurisdiction” over PIFSS. Decision at 11–12.

S.D.N.Y. Aug. 6, 2021)). The Bankruptcy Court stated that this Court in *Cohmad* “determined that ‘those defendants who claim the protections of Section 546(e) through a Madoff Securities account agreement but who actually knew that Madoff Securities was a Ponzi scheme are not entitled to the protections of the Section 546(e) safe harbor, and their motions to dismiss Trustee’s claims on this ground must be denied.’” Decision at 23 (quoting *Cohmad*, 2013 WL 1609154, at \*10). The Bankruptcy Court did *not* address PIFSS’ arguments that (a) *Cohmad* requires courts to look to the alleged knowledge of the transferee raising the safe harbor, and (b) Sentry’s Articles of Association, which governed the Transfer, constitutes a separate securities contract independently sufficient to bring the Transfer within the safe harbor.

On September 1, 2022, the Bankruptcy Court entered the Order denying the Motion to Dismiss and Motion to Strike.

On October 6, 2022, PIFSS timely filed a notice of appeal and this Motion.

### **RELIEF SOUGHT**

PIFSS requests leave to appeal the Order denying its Motion to Dismiss.

### **ARGUMENT**

#### **A. The Bankruptcy Court’s Ruling that PIFSS Is Not Entitled to Sovereign Immunity Under the FSIA Is Immediately Appealable.**

The Bankruptcy Court’s denial of sovereign immunity to PIFSS under the FSIA is appealable as of right under the collateral order doctrine. Under that

doctrine, an interlocutory order that is “sufficiently final and distinct from the merits [is] appealable without waiting for a final judgment to be entered.” *EM Ltd. v. Banco Central De La Republica Argentina*, 800 F.3d 78, 87 (2d Cir. 2015) (quotation marks, citation and footnote omitted); accord 28 U.S.C. §§ 158(a)(1), 1291; see also *Rogers v. Petroleo Brasileiro, S.A.*, 673 F.3d 131, 136 (2d Cir. 2012) (“[T]he collateral order doctrine . . . allows an immediate appeal from an order denying immunity under the FSIA.” (quotation marks omitted)). This doctrine applies to appeals from bankruptcy courts under Section 158(a)(1). *Worms v. State Corp. “Deposit Ins. Agency”*, 20-CV-3505, 2021 WL 706550, at \*2 (S.D.N.Y. Feb. 22, 2021).

The Second Circuit has held repeatedly that the collateral order doctrine “allows an immediate appeal from an order denying immunity under the FSIA.” *Petersen Energía Inversora S.A.U. v. Argentine Republic & YPF S.A.*, 895 F.3d 194, 203 (2d Cir. 2018) (quotation marks and citation omitted); see also *EM*, 800 F.3d at 88 & nn.36, 41 (collecting cases); *Kensington Int’l Ltd. v. Republic of Congo*, 461 F.3d 238, 240 (2d Cir. 2006) (“A denial of the claim of FSIA immunity from suit is immediately appealable because any ultimate success [on appeal from a final judgment] would not redress the erroneous denial of an immunity from the trial itself.” (quotation marks and citation omitted) (alteration in original)). It is undisputed, as Trustee conceded, that PIFSS is a foreign state under the FSIA.

Decision at 5. Accordingly, the Bankruptcy Court's denial of PIFSS' claim of FSIA immunity from suit is immediately appealable as of right under the collateral order doctrine.

1. Alternatively, the Court Should Grant Leave to Appeal the Order Denying PIFSS' FSIA Immunity.

Even if the collateral order doctrine does not apply with respect to the FSIA, the Court should grant PIFSS leave to appeal the issue under Section 158(a)(3).

In determining whether to grant an interlocutory appeal under Section 158(a)(3), courts apply the standard governing interlocutory appeals from district courts to courts of appeals under 28 U.S.C. § 1292(b). *See In re Fairfield Sentry Ltd. Litig.*, 458 B.R. 665, 672–73 (S.D.N.Y. 2011). Under that standard, a court may permit appeal if (1) the “order involves a controlling question of law”; (2) “there is substantial ground for difference of opinion” regarding that question; and (3) “an immediate appeal from that order may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b). In weighing those considerations, courts determine whether “exceptional circumstances” overcome the presumption against piecemeal appeals. *Fairfield Sentry*, 458 B.R. at 673. “Exceptional circumstances” include cases where appellate review might “avoid protracted and expensive litigation.” *Telectronics Proprietary, Ltd. v. Medtronic, Inc.*, 690 F. Supp. 170, 172 (S.D.N.Y. 1987). All three factors are easily satisfied here.

a. The Appeal Presents a Controlling Question of Law.

To be a “controlling question of law,” the question must “refer to a ‘pure’ question of law that the reviewing court could decide quickly and cleanly without having to study the record.” *Fairfield Sentry*, 458 B.R. at 673 (quotation marks and citations omitted). In addition, the question must “be ‘controlling’ in the sense that reversal of the bankruptcy court would terminate the action, or at a minimum that determination of the issue on appeal would materially affect the litigation’s outcome.” *Id.* (quotation marks and citations omitted).

The jurisdictional question of whether PIFSS is immune from suit under FSIA plainly qualifies as a “controlling question of law.” 28 U.S.C. § 1292(b). If the Court holds that PIFSS has sovereign immunity, the Bankruptcy Court would have no jurisdiction, and the adversary proceeding would terminate immediately. This issue therefore satisfies the first prong of Section 1292(b).

b. Substantial Ground for Difference of Opinion Exists as to Whether PIFSS Is Immune from Suit.

An appeal satisfies the second prong of the section 1292(b) if there is “substantial ground for difference of opinion,” *i.e.*, “a genuine doubt as to whether the district court applied the correct legal standard in its order.” *Fairfield Sentry*, 458 B.R. at 673 (quotation marks and citations omitted). “A substantial ground for difference of opinion exists where reasonable jurists might disagree on an issue’s resolution, not merely where they have already disagreed.” *Reese v. BP Exploration*

(*Alaska*) *Inc.*, 643 F.3d 681, 686 (9th Cir. 2011). “To determine whether the issue for appeal is truly one on which there is a substantial ground for dispute, a district court must analyze the strength of the arguments in opposition to the challenged ruling.” *Bilello v. JPMorgan Chase Ret. Plan*, 603 F. Supp. 2d 590, 593–94 (S.D.N.Y. 2009) (quotation marks and citation omitted).

The Bankruptcy Court applied the wrong legal standard when it held that the third clause of the commercial activity exception applied to defeat PIFSS’ immunity. In reaching its decision, the Bankruptcy Court relied solely on a 2012 opinion in *Picard v. Bureau of Labor Ins. (In re BLMIS)*, 480 B.R. 501 (Bankr. S.D.N.Y. 2012) (“*BLI*”), which found that the third clause was met because a subsequent transferee’s investment in and redemption out of Sentry caused a two-way flow of funds between Sentry and BLMIS. Decision at 6–8.

However, *BLI* predates the Supreme Court’s decision in *OBV Personenverkehr AG v. Sachs*, 577 U.S. 27 (2015), which clarified the “based upon” requirement of the commercial activity exception. Courts now are required to “look to the basis or foundation for a claim, those elements . . . that, if proven, would entitle a plaintiff to relief and the gravamen of the complaint.” *Id.* at 33–34 (quotation marks and citations omitted). Thus, the *BLI* court wrongly focused on BLI’s investment (rather than its receipt of alleged customer property) when it summarily concluded that “the Trustee’s instant suit is based upon BLI’s investment of tens of millions of

dollars in [] Sentry with the specific goal of having funds invested in BLMIS in New York, with intent to profit therefrom.” *BLI*, 480 B.R. at 506. *OBB* makes clear that the only conduct relevant to Trustee’s claim against PIFSS is its receipt of the Transfer, *see* 577 U.S. at 33–34, which is the act “upon” which the Complaint is “based.”<sup>4</sup> The Bankruptcy Court agreed that PIFSS’ receipt of the Transfer is the relevant conduct for the first prong, Decision at 6, but, relying on *BLI*, then focused on altogether different conduct for the third prong—the two-way flow of funds between Sentry and BLMIS—to find that there was a “direct effect,” *id.* at 8. The Bankruptcy Court did not zero in on the correct conduct and, as a result, did not apply the proper standard for the commercial activity exception under *OBB*.

Moreover, application of the third clause of the commercial activity exception to a subsequent transferee that is a foreign state is an issue of first impression. *See Fairfield Sentry*, 458 B.R. at 673 (“Substantial ground would exist if the issue is difficult and of first impression.” (quotation marks and citations omitted)). Indeed, the Bankruptcy Court’s finding that there was a direct effect in the United States based on the flow of funds between Sentry and BLMIS supports the opposite

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<sup>4</sup> The relevant “act” for “direct effect” is the one that underpins the “based upon” prong. *See* 28 U.S.C. § 1605(a)(2) (“based . . . upon *an act* outside the territory the territory of the United States in connection with a commercial activity of the foreign state elsewhere *and that act* causes a direct effect in the United States” (emphasis added)).

conclusion that PIFSS' acts caused a "direct" effect. "[A]n effect is 'direct' if it follows 'as an *immediate* consequence of the *defendant's . . . activity*.'" *Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 74 (2d Cir. 2009) (emphasis added) (citation omitted). There must be "no intervening element." *Id.* (citations omitted). Here, however, Sentry's alleged acts of sending money to BLMIS, issuing requests to receive money from BLMIS, honoring PIFSS' redemption request, and/or using its own funds to satisfy PIFSS' redemption request are all intervening elements that sever the connection between PIFSS' conduct in receiving the Transfer and any effect in the U.S.<sup>5</sup> See generally *Christy v. Alexander & Alexander Inc. (In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey)*, 130 F.3d 52, 57–58 (2d Cir. 1997) (holding that initial transferee is one that, at minimum, has dominion over the money, with the right to put the money to one's own purposes).

The Bankruptcy Court thus applied the wrong legal standard when it (1) failed to apply the "based upon" standard as articulated in *OBB* and therefore focused on the wrong conduct in its analysis of the focus of the first and third prongs of the third clause of the commercial activity exception, and (2) ignored that Sentry, the initial transferee, was an intervening element that precludes a finding that PIFSS' foreign acts caused a direct effect in the United States.

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<sup>5</sup> The Bankruptcy Court nevertheless recognized Sentry's role as an initial transferee when it denied PIFSS' assertion of the Section 546(e) defense.

c. Resolution on Appeal Materially Advances the Litigation.

Resolution of PIFSS' sovereign immunity materially advances the termination of the adversary proceeding. An appeal materially advances the termination of the litigation if it "promises to advance the time for trial or to shorten the time required for trial" or has "the potential for substantially accelerating the disposition of the litigation." *Primavera Familienstiftung v. Askin*, 139 F. Supp. 2d 567, 570 (S.D.N.Y. 2001) (citations omitted). If this Court grants leave to appeal and reverses the Bankruptcy Court's determination that the commercial activity exception defeats PIFSS' sovereign immunity, the adversary proceeding would be dismissed for lack of subject matter jurisdiction.

**B. The Court Should Grant Leave to Appeal the  
Finding that PIFSS Is Subject to Personal Jurisdiction.**

1. The Appeal Presents a Controlling Question of Law.

Whether PIFSS is subject to the Bankruptcy Court's personal jurisdiction is a "controlling question of law" because "reversal of the bankruptcy court would terminate the action," which this Court "could decide quickly and cleanly without having to study the record." *Fairfield Sentry*, 458 B.R. at 673 (quotation marks and citations omitted); *see also Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 921 F.2d 21, 24 (2d Cir. 1990) ("[W]e have granted certification [of interlocutory appeals] when the order involved issues of in personam . . . jurisdiction."). That standard is met here. The

only issue is whether Trustee sufficiently alleged that PIFSS had contacts with the U.S. justifying the exercise of specific personal jurisdiction. A motion to dismiss for lack of personal jurisdiction is resolved by analyzing the complaint and accompanying affidavits. *See DiStefano v. Carozzi N. Am., Inc.*, 286 F.3d 81, 84 (2d Cir. 2001). The case would terminate if the Court were to determine the Bankruptcy Court lacked personal jurisdiction over PIFSS.

The Court also may “properly consider the system-wide costs and benefits of the allowing the appeal” by evaluating the “impact that an appeal will have on other cases.” *Klinghoffer*, 921 F.2d at 24. Foreign defendants in other Madoff-related cases have challenged the Bankruptcy Court’s personal jurisdiction over them because their purported contacts with the U.S. are actually contacts with foreign entities that in turn had contacts with the U.S.<sup>6</sup> As described in Section B.2 below, the issue of personal jurisdiction raises a legal question about whether the Bankruptcy Court erred in concluding that a transaction between a foreign defendant and a foreign entity suffices to establish U.S. jurisdiction. This question is common to other Madoff-related cases against foreign defendants that allegedly received

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<sup>6</sup> According to Trustee’s Twenty-Seventh Interim Report for the Period October 1, 2021 Through March 31, 2022, defendants in 27 of Trustee’s 79 pending subsequent transfer actions moved to dismiss. *In re Bernard L. Madoff*, Adv. Pro. No. 08-01789 (Bankr. S.D.N.Y.), Dkt. No. 21473 at ¶¶ 229, 231.

redemption payments from Sentry. Obtaining appellate resolution of that issue will impact other pending cases, which weighs in favor of certifying this appeal.

2. Substantial Ground for Difference of Opinion Exists as to Whether PIFSS Can Be Subjected to the Bankruptcy Court's Jurisdiction.

Substantial ground for difference of opinion exists as to whether a single allegation that a foreign defendant “knowingly directed funds to be invested with” a U.S. entity through a third-party foreign entity, *see* Decision at 9, suffices to confer personal jurisdiction.<sup>7</sup>

The Bankruptcy Court concluded that a party like PIFSS “purposefully avail[s] itself of the benefits and protections of New York laws by knowing, intending and contemplating that the substantial majority of funds invested in Fairfield Sentry would be transferred to BLMIS in New York to be invested in the New York securities market.” Decision at 10 (quoting *BLI*, 480 B.R. at 517). Reasonable jurists have disagreed with this conclusion.

Indeed, Supreme Court precedent establishes that the Bankruptcy Court erred

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<sup>7</sup> The Bankruptcy Court also generally referred to Trustee's allegations, made upon information and belief, that PIFSS wired funds through a New York bank and maintained contact with FGG representatives in New York. Decision at 8; Compl. ¶ 7. These allegations are not the basis of the Bankruptcy Court's decision to exercise personal jurisdiction over PIFSS, and, as identified by a similarly situated defendant in another subsequent transferee case, these allegations are substantially the same as those in many complaints Trustee filed against foreign investors. *Picard v. Banque Lombard Odier & Cie SA (In re BLMIS)*, 22-cv-06561-LGS (S.D.N.Y.), Dkt. No. 4 at 16–17.

in holding that PIFSS' contacts with a foreign third party are jurisdictional contacts. The Supreme Court has set forth two related principles for specific jurisdiction: (1) "the relationship must arise out of contacts that the '*defendant* himself' creates with the forum State"; (2) the "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Walden v. Fiore*, 571 U.S. 277, 284–85 (2014). The defendant's "suit-related conduct must create a substantial connection with the forum state." *Id.* at 284; *see also SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 344 (2d Cir. 2018) (substantial connection "depends on the relationship among the defendant, the forum, and the litigation"). Contacts "between . . . third parties . . . and the forum" are irrelevant, *id.*, because "unilateral activity of . . . a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum," *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984). Accordingly, "a defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction," *Walden*, 571 U.S. at 286, even if the third party's activity in the forum is foreseeable, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295–97 (1980) ("[I]t is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.").

The Bankruptcy Court did not cite precedent from the Supreme Court, Second

Circuit, or this Court in support of its conclusion that personal jurisdiction can be based on a defendant's alleged knowledge that an investment made with a foreign fund would end up with a New York-based entity. The only case the Bankruptcy Court cited is *BLI*, a decision made by another bankruptcy court before the Supreme Court rendered its opinion in *Walden*, and the holding of *Walden* calls into question the propriety of *BLI*. The *BLI* court held that a foreign defendant that invested with Sentry was subject to the Court's personal jurisdiction based on the defendant's alleged knowledge of Sentry's investments in BLMIS. *See* 480 B.R. at 515–17. This analysis improperly focused on a third party's contacts with the U.S. and is based on exactly the type of foreseeability argument the Supreme Court rejected in *Walden*. *See* 571 U.S. at 289.

Here, the Complaint is devoid of well-pled allegations of contacts between PIFSS and the U.S. related to the Transfer. *Contra Picard v. BNP Paribas S.A. (In re BLMIS)*, 594 B.R. 167, 192 (Bankr. S.D.N.Y. 2018) (finding sufficient contacts where defendants invested in domestic funds, defendants' derivatives group, which offered customers access to BLMIS transactions, monitored Madoff transactions, and "operated from New York," and "the subsequent transfers were largely the result of those New York activities"). The Bankruptcy Court's conclusion that PIFSS' alleged knowledge that funds from its investment in Sentry would eventually end up in New York would significantly expand the jurisdiction of all U.S. courts to cover

foreign entities that invest in foreign funds that in turn invest with U.S. entities. This expansive conception of personal jurisdiction runs afoul of settled Supreme Court precedent and ignores “policies of other nations whose interests are affected by the assertion of jurisdiction.” *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 115 (1987) (emphasis omitted).

3. Resolution on Appeal Materially Advances the Litigation.

Resolution of the issue of personal jurisdiction materially advances the termination of this case. *See Primavera*, 139 F. Supp. 2d at 570 (appeal materially advances the litigation if it has “the potential for substantially accelerating the disposition of the litigation”) (citations omitted). If this Court reverses the Bankruptcy Court’s decision to exercise personal jurisdiction over PIFSS, then the case will be dismissed. This factor weighs in favor of allowing the appeal.

C. **The Court Should Grant Leave to Appeal the Bankruptcy Court’s Misapplication of *Cohmad*.**

The Court should also grant PIFSS leave to appeal the Bankruptcy Court’s holding that *Cohmad* precludes PIFSS’ Bankruptcy Code Section 546(e) defense. All three criteria under Section 1292(b) are met here. First, no factual disputes must be resolved to answer the controlling legal questions presented. Second, the Bankruptcy Court’s application of *Cohmad* presents substantial grounds for reversal. Third, reversal of the Bankruptcy Court on the correct interpretation of *Cohmad* would necessarily result in dismissal of this proceeding.

As noted, the Bankruptcy Court's application of *Cohmad* not only stripped PIFSS of its ability to assert a Section 546(e) defense, but also stripped dozens of similarly situated subsequent transferees of this defense. There are currently at least seven pending motions for leave to appeal the Bankruptcy Court's decisions on *Cohmad* pending before The Honorable Jed S. Rakoff, with a hearing to consider the motions scheduled for October 13, 2022.<sup>8</sup> To the extent the District Court grants these motions, PIFSS seeks leave to join in those appeals.

### **CONCLUSION**

The Court should grant leave to appeal the Bankruptcy Court's Order denying PIFSS' Motion to Dismiss.

Dated: October 6, 2022  
New York, New York

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<sup>8</sup> See S.D.N.Y. dockets for civil action nos. 22-cv-6512, 22-cv-7195, 22-cv-7173, 22-cv-7189, 22-cv-6502, 22-cv-7372, and 22-cv-7788.

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**CERTIFICATE OF COMPLIANCE**

1. This document complies with the word limit of Bankruptcy Rule 8013(f)(3)(A) because, excluding the parts of the document exempted by Bankruptcy Rule 8015(g), this document contains 4,966 words, according to the wordcount function of the word-processing system used to prepare the document.

2. This document complies with the typeface requirements of Bankruptcy Rule 8015(a)(5) and the type-style requirements of Bankruptcy Rule 8015(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word Version in 14-point Times New Roman font.

Dated: October 6, 2022

/s/ Leo Muchnik

Leo Muchnik

12-01002-cgm Doc 155-1 Filed 10/06/22 Entered 10/06/22 17:50:54 Ex. A:  
Order Denying PIFSS Motion to Dismiss Pg 1 of 3

## **EXHIBIT A**

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES INVESTOR PROTECTION  
CORPORATION,

Plaintiff-Applicant,

v.

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Defendant.

Adv. Pro. No. 08-01789 (CGM)

SIPA LIQUIDATION

(Substantively Consolidated)

In re

BERNARD L. MADOFF,

Debtor.

IRVING H. PICARD, Trustee for the Substantively  
Consolidated SIPA Liquidation of Bernard L. Madoff  
Investment Securities LLC and the Chapter 7 Estate of  
Bernard L. Madoff,

Plaintiff,

v.

The Public Institution for Social Security,

Defendant.

Adv. Pro. No. 12-01002 (CGM)

**ORDER DENYING THE PUBLIC INSTITUTION FOR SOCIAL  
SECURITY'S MOTION TO DISMISS THE COMPLAINT AND MOTION  
TO STRIKE THE DECLARATION OF BRIAN W. SONG**

Defendant the Public Institution for Social Security's ("Defendant" or "PIFSS") motion to dismiss the Complaint under the Foreign Sovereign Immunities Act, 28 U.S.C. § § 1602-1611, Bankruptcy Rule 7012(b), and Federal Rule of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6) (the "Motion to Dismiss") and Defendant's motion to strike the declaration of Brian W. Song and

all attached exhibits numbered 1 through 13 (the “**Motion to Strike**”) came on for hearing before the Court on July 13, 2022 (the “**Hearing**”). The Court has considered the Motion to Dismiss and the Motion to Strike, the papers filed in support of and in opposition to the motions, the Complaint, and the statements of counsel at the Hearing, and the Court has issued a memorandum decision, dated August 17, 2022, regarding the Motion (the “**Decision**”). For the reasons set forth in the Decision, **IT IS ORDERED**:

1. The Motion to Dismiss the Complaint is denied.
2. The Motion to Strike is denied.
3. The deadline for Defendant to file an answer to the Complaint is October 14, 2022.
4. The Court shall retain jurisdiction to implement or enforce this Order.

**Dated: September 1, 2022**  
**Poughkeepsie, New York**



**/s/ Cecelia G. Morris**

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**Hon. Cecelia G. Morris**  
**U.S. Bankruptcy Judge**

## **EXHIBIT B**

**NOT FOR PUBLICATION**

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION  
CORPORATION,

Plaintiff-Applicant,

v.

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Defendant.

No. 08-01789 (CGM)

SIPA LIQUIDATION

(Substantively Consolidated)

In re:

BERNARD L. MADOFF,

Debtor.

IRVING H. PICARD, Trustee for the Liquidation of  
Bernard L. Madoff Investment Securities LLC,

Plaintiff,

v.

The Public Institution for Social Security,

Defendant.

Adv. Pro. No. 12-01002 (CGM)

**MEMORANDUM DECISION DENYING DEFENDANT'S MOTION TO  
DISMISS AND MOTION TO STRIKE**

**A P P E A R A N C E S :**

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Liquidation of Bernard L. Madoff Investment Securities LLC and the Chapter 7 Estate of  
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**CECELIA G. MORRIS**  
**UNITED STATES BANKRUPTCY JUDGE**

Pending before the Court is the motion by the Defendant, the Public Institution for Social Security (“PIFSS”), to dismiss the complaint of Irving Picard, the trustee (“Trustee”) for the liquidation of Bernard L. Madoff Investment Securities LLC (“BLMIS”) seeking to recover subsequent transfers allegedly consisting of BLMIS customer property. PIFSS seeks dismissal for lack of subject matter jurisdiction, for lack of personal jurisdiction, for failure to plead a cause of action due to improper adoption by reference; for failure to state a claim due to the safe harbor provision of the Bankruptcy Code, and for failure to plead that the transfers from BLMIS were customer property. The Defendants further moves to strike the declaration of Brian W. Song (the “Song Declaration”) and all attached exhibits, numbered 1 through 13. For the reasons set forth herein, the motion to dismiss and motion to strike are denied in their entirety.

**Jurisdiction**

This is an adversary proceeding commenced in this Court, in which the main underlying SIPA proceeding, Adv. Pro. No. 08-01789 (CGM) (the “SIPA Proceeding”), is pending. The SIPA Proceeding was originally brought in the United States District Court for the Southern District of New York (the “District Court”) as *Securities Exchange Commission v. Bernard L. Madoff Investment Securities LLC et al.*, No. 08-CV-10791, and has been referred to this Court. This Court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b) and (e)(1), and 15 U.S.C. § 78eee(b)(2)(A) and (b)(4).

This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (F), (H) and (O). Submit matter jurisdiction and personal jurisdiction have been contested by the Defendant and will be discussed *infra*.

### **Background**

The Court assumes familiarity with the background of the BLMIS Ponzi scheme and its SIPA proceeding. *See Picard v. Citibank, N.A. (In re BLMIS)*, 12 F.4th 171, 178–83 (2d Cir. 2021), *cert. denied sub nom. Citibank, N.A. v. Picard*, 142 S. Ct. 1209, 212 L. Ed. 2d 217 (2022).

This adversary proceeding was filed on January 5, 2012. Compl., ECF<sup>1</sup> No. 1. The Defendant was a government agency of the State of Kuwait responsible for investing the assets of and administering the Kuwaiti social security system. *Id.* ¶ 3. Via the complaint (“Complaint”), the Trustee seeks to recover subsequent transfers made to the Defendant. *Id.* ¶ 2. The subsequent transfers were derived from investments with BLMIS made by other funds, including Fairfield Sentry Limited (“Fairfield Sentry”). *Id.* These funds are referred to as “feeder funds” because the intention of the fund was to invest in BLMIS. *Id.* ¶ 7.

Following BLMIS’s collapse, the Trustee filed an adversary proceeding against Fairfield Sentry and related defendants to avoid and recover fraudulent transfers of customer property in the amount of approximately \$3 billion. *Id.* ¶¶ 35, 36. In 2011, the Trustee settled with Fairfield Sentry. *Id.* ¶ 40. As part of the settlement, Fairfield Sentry consented to a judgment in the amount of \$3.054 billion (Consent J., 09-01239-cgm, ECF No. 109) but repaid only \$70 million to the BLMIS customer property estate. The Trustee then commenced a number of adversary proceedings against subsequent transferees like Defendant to recover the approximately \$3 billion in missing customer property. The Trustee alleges that the Defendant received

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<sup>1</sup> Unless otherwise indicated, all references to “ECF” are references to this Court’s electronic docket in adversary proceeding 12-01002-cgm.

approximately \$20,000,000 of funds initially transferred from BLMIS to Fairfield Sentry and subsequently from Fairfield Sentry to the Defendant. Compl. ¶ 41, ECF No. 1; Stip., ECF 111 (amending Count One of the Complaint to recovery of one transfer in the amount of \$20,000,000).

### Discussion

#### **Subject Matter Jurisdiction**

This Court has subject matter jurisdiction over these adversary proceedings pursuant to 28 U.S.C. §§ 1334(b) and 157(a), the District Court’s Standing Order of Reference, dated July 10, 1984, and the Amended Standing Order of Reference, dated January 31, 2012. In addition, the District Court removed the SIPA liquidation to this Court pursuant to SIPA § 78eee(b)(4), (*see* Order, Civ. 08– 01789 (Bankr. S.D.N.Y. Dec. 15, 2008), at ¶ IX (ECF No. 1)), and this Court has jurisdiction under the latter provision. Personal jurisdiction has been contested by this Defendant and will be discussed *infra*.

The Defendant objects to the Court’s subject matter jurisdiction, arguing that it is immune from liability under the Foreign Sovereign Immunities Act (the “FSIA”). Mot. to Dismiss, ECF No. 118. The FSIA, 28 U.S.C. §§ 1602–1611, determines whether a federal court may exercise jurisdiction over a foreign state. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443, 109 S.Ct. 683, 693, 102 L. Ed. 2d 818 (1989) (“[T]he FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country.”). A foreign state is “presumptively immune from the jurisdiction of United States courts; unless a specified exception applies.” *Saudi Arabia v. Nelson*, 507 U.S. 349, 355, 113 S. Ct. 1471, 1476, 123 L. Ed. 2d 47 (1993). Where no exception applies, “federal courts lack subject-matter jurisdiction over claims against foreign states.” *Picard v. Bureau of Labor Ins. (In re Bernard L.*

*Madoff*), 480 B.R. 501, 510 (Bankr. S.D.N.Y. 2012) (“*BLP*”). After the Defendant has made a prima facie case that it is a foreign state, the “burden shifts to the plaintiff, who must then produce evidence to demonstrate that immunity should not be granted under exceptions to the FSIA.” *Id.* (citing *Cargill Int’l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir.1993)).

The Defendant is a Foreign State Under the FSIA

The FSIA defines “foreign state” to include “a political subdivision of a foreign state or an “agency or instrumentality of a foreign state as defined in subsection (b).” 28 U.S.C. § 1603(a). The Trustee has conceded that the Defendant is a foreign state under the FSIA. Compl. ¶ 22; Reply 7, ECF No. 122. The Defendant is presumptively immune from the jurisdiction of this Court. The Trustee argues that the Defendant is nevertheless exempt from immunity under the FSIA’s commercial activity exception.

The Commercial Activities Exception to the FSIA Applies

Under 28 U.S.C.A. § 1605, a foreign state is not immune from jurisdiction of the federal courts in cases

in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). The Defendant argues that only the third and final clause of the exception could apply as it is “undisputed that PIFSS is a foreign governmental agency and that its conduct occurred outside the United States”. Mot. to Dismiss, ECF No. 118. The final clause of the commercial activities exception,

consists of three elements: (1) the operative act (i.e., the gravamen of the complaint) must have occurred outside the United States, (2) the act must have occurred in connection with a commercial activity of the foreign state elsewhere, and (3) the act [must have] cause[d] a direct effect in the United States.

*MMA Consultants I, Inc. v. Republic of Peru*, 719 F. App'x 47, 54 (2d Cir. 2017) (cleaned up).

The gravamen of the complaint is the basis or foundation of a claim, that is, those elements that, if proven, would entitle a plaintiff to relief. *Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 107 (2d Cir. 2016). The Defendant and the Trustee agree that the gravamen of the Complaint is PIFSS's receipt of funds due to its subscription into Fairfield Sentry. Mot. at 10, ECF No. 118; Opp'n at 8, ECF No. 122. This conduct occurred outside of the territory of the United States. *Id.* The Trustee has met the first prong of the final clause of the commercial activities exception.

The Act must have occurred in connection with a commercial activity. The FSIA defines "commercial activity" as "a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). The activity of a foreign state is "commercial" within the meaning of the FSIA "if the sovereign undertakes the act 'not as regulator of a market, but in the manner of a private player within it.'" *MMA Consultants I, Inc.*, 719 F. App'x at 52 (quoting *Republic of Argentina v. Weltover, Inc.* 504 U.S. 607, 614, 112 S. Ct. 2160, 2166, 119 L. Ed. 2d 394 (1992)). Judge Lifland found a foreign state agency's investment in Fairfield Sentry to be a commercial activity as it "did not involve the use of powers peculiar to sovereigns." *BLI*, 480 B.R. at 512.

The Complaint has alleged that PIFSS entered into subscription agreements with Fairfield Sentry and received subsequent transfers of BLMIS funds through Fairfield Sentry totaling approximately \$30,000,000. Compl. ¶¶ 6, 7, 34–42, ECF No. 1. PIFSS was acting as a private player within a market through these actions, not as a regulator of a market. PIFSS does not dispute that the actions are commercial activity as it is used in the FSIA. Rather, PIFSS assumes this second prong *arguendo* and argues that the complaint should be dismissed for failure to

plead any direct effect in the United States. The issue then is whether the Trustee has satisfied the third prong; that is, whether the Defendant's actions had a direct effect in the United States.

Under the third clause of the commercial activities exception, "an effect is direct if it follows as an immediate consequence of the defendant's ... activity." *Republic of Argentina*, 504 U.S. at 618 (internal quotation marks omitted); *see also MMA Consultants I, Inc.*, 719 F. App'x at 54. In construing whether the effect constitutes a "direct effect in the United States," the Court will be mindful of "providing access to the courts to those aggrieved by the commercial acts of a foreign sovereign." *Texas Trading & Mill. Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 312 (2d Cir. 1981) (internal quotation marks omitted) *overruled on other grounds by Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009); *see also BLI*, 480 B.R. at 513 (finding that courts in the Second Circuit must liberally construe what constitutes a "direct effect in the United States"). The effect must be more than merely "fortuitous or incidental, playing only a tangential role in the lawsuit." *BLI*, 480 B.R. at 513 (citing *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 999 F.2d 33, 36 (2d Cir. 1993))

In *BLI*, Judge Lifland denied a similar motion to dismissed based on a FSIA claim of immunity. Judge Lifland found that the *BLI* defendant's actions caused a direct effect in the United States by "causing a two-way flow of funds" in the "form of subscription and redemption payments" into BLMIS to invest in the United States and from BLMIS in "the form of profits from those investments." *BLI*, 480 B.R. at 513.

The Defendant argues that *BLI* was overruled by the Supreme Court in *OBV Personenverkehr AG v. Sachs*, 577 U.S. 27, 136 S.Ct. 390, 193 L. Ed. 2d 269 (2015). This argument is unavailing. The Supreme Court, in *OBV Personenverkehr*, examined the first clause of the commercial activities exception. *Id.* at 31 n.1 ("As Sachs relies only on the first clause to

establish jurisdiction over her suit, we limit our inquiry to that clause.”). The Court determined that the conduct constituting the gravamen of the personal injury suit against the Austrian state-owned railway carrier occurred abroad, where the plaintiff fell onto railroad tracks while attempting to board a train. *Id.* at 35. The Court found that the suit was not based upon the sale of a Eurail ticket in the United States. *Id.* at 38. The Court did not address or overrule Judge Lifland’s holding in *BLI*.

Here, the Trustee’s Complaint alleges the Defendant’s subscription into and redemption out of Fairfield Sentry. These actions created a two-way flow of funds that had a direct effect in the United States. As immunity under the FSIA does not apply due to the third clause of the commercial activities exception, the Court need not consider whether the Defendant’s conduct satisfied the first or second clauses. PIFSS is not entitled to immunity under the FSIA.

### **Personal Jurisdiction**

PIFSS objects to the Trustee’s assertion of personal jurisdiction. The Trustee argues in the Complaint that the Defendant purposefully availed itself of the laws of the United States and New York by directing funds to be invested with New York-based BLMIS through Fairfield Sentry, investing in a structured product based on Fairfield Sentry’s investment returns through the Bank of New York, and maintaining regular contact with Fairfield Greenwich Group account representatives located in New York. Compl. ¶¶ 6–8, ECF No. 1.

To survive a motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, the Trustee “must make a prima facie showing that jurisdiction exists.” *SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 342 (2d Cir. 2018) (quoting *Penguin Grp. (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 34–35 (2d Cir. 2010)). A trial court has considerable procedural leeway when addressing a pretrial dismissal motion under Rule 12(b)(2).

*Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 84 (2d Cir. 2013). “It may determine the motion on the basis of affidavits alone; or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion.” *Id.* (quoting *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981)); *see also Picard v. BNP Paribas S.A. (In re BLMIS)*, 594 B.R. 167, 187 (Bankr. S.D.N.Y. 2018) (same).

“Prior to discovery, a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith, legally sufficient allegations of jurisdiction.” *Dorchester Fin.*, 722 F.3d at 84–85 (quoting *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir. 1990)); *Picard v. Fairfield Greenwich Grp. (In re Fairfield Sentry Ltd.)*, 627 B.R. 546, 565 (Bankr. S.D.N.Y. 2021) (same). In this case, the Trustee has alleged legally sufficient allegations of jurisdiction simply by stating that PIFSS “knowingly directing funds to be invested with New York-based BLMIS.” This allegation alone is sufficient to establish a prima facie showing of jurisdiction over the Defendant at the pre-discovery stage of litigation. This was not the only allegation made by the Trustee.

At the pre-discovery stage, the allegations need not be factually supported. *See Dorchester Fin. Securities Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 85 (2d Cir. 2013) (an averment of facts is necessary only after discovery). In order to be subjected to personal jurisdiction in the United States, due process requires that a defendant have sufficient minimum contacts with the forum in which defendant is sued “such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *BLI*, 480 B.R. at 516 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). The pleadings and affidavits are to be construed “in the light most favorable to the plaintiffs, resolving all doubts in their favor.” *Chloé v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 163 (2d Cir. 2010) (quoting *Porina v. Marward*

*Shipping Co.*, 521 F.3d 122, 126 (2d Cir. 2008)); *Picard v. BNP Paribas S.A. (In re BLMIS)*, 594 B.R. 167, 187 (Bankr. S.D.N.Y. 2018).

The Supreme Court has set out three conditions for the exercise of specific jurisdiction over a nonresident defendant. First, the defendant must have purposefully availed itself of the privilege of conducting activities within the forum State or have purposefully directed its conduct into the forum State. Second, the plaintiff's claim must arise out of or relate to the defendant's forum conduct. Finally, the exercise of jurisdiction must be reasonable under the circumstances.

*U.S. Bank Nat'l Ass'n v. Bank of Am. N.A.*, 916 F.3d 143, 150 (2d Cir. 2019) (cleaned up).

#### Purposeful Availment

"[M]inimum contacts . . . exist where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there." *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 82 (2d Cir. 2018). "Although a defendant's contacts with the forum state may be intertwined with its transactions or interactions with the plaintiff or other parties, a defendant's relationship with a third party, standing alone, is an insufficient basis for jurisdiction." *U.S. Bank Nat'l Ass'n v. Bank of Am. N.A.*, 916 F.3d 143, 150 (2d Cir. 2019) (cleaned up). "It is insufficient to rely on a defendant's random, fortuitous, or attenuated contacts or on the unilateral activity of a plaintiff with the forum to establish specific jurisdiction." *Id.*

A party "purposefully avail[s] itself of the benefits and protections of New York laws by knowing, intending and contemplating that the substantial majority of funds invested in Fairfield Sentry would be transferred to BLMIS in New York to be invested in the New York securities market." *BLI*, 480 B.R. at 517.

PIFSS argues that the Trustee has failed to allege sufficient minimum contacts with the United States. The Complaint suggests otherwise. In the Complaint, the Trustee alleges that PIFSS "knowingly directed funds to be invested with New York-based BLMIS through Fairfield

Sentry” and “knowingly received subsequent transfers from BLMIS by withdrawing money from Fairfield Sentry.” Compl. ¶ 6, ECF No. 1. The Trustee has also alleged that Fairfield Sentry invested almost all of its assets in BLMIS. *See* Fairfield Compl. ¶ 89, *Picard v. Fairfield Inv Fund Ltd.*, Adv. Pro. No. 09-1239, ECF No. 286 (the “Fairfield Amended Complaint”) (“Under Fairfield Sentry’s offering memorandum, the fund’s investment manager was required to invest no less than 95% of the fund’s assets through BLMIS.”) (adopted by reference, at paragraph 35, of this Complaint); *see, e.g.* Song Decl., Fairfield Sentry Information Memo., ECF No. 123, Ex. 1 (“The Company will seek to achieve capital appreciation of its assets by allocating its assets to an account at Bernard L. Madoff Investment Securities (‘BLM’), a registered broker-dealer in New York, New York, which employs an options trading strategy described as ‘split strike conversion.’”).

The Trustee has submitted additional evidence in response to the motion to dismiss. Attached as exhibits to the Song Declaration, the Trustee has provided evidence that PIFSS bank accounts in New York to send subscription payments to Fairfield Sentry totaling \$5,000,000. Song Decl., Ex. 3. PIFSS used correspondent accounts in New York to send subscription payments totaling \$15,000,000 and receive subsequent transfers totaling \$20,000,000. Song Decl., Ex. 2. PIFSS’s offshore subsidiary, Wafra, met with representatives of the Fairfield Greenwich Group at Fairfield’s offices in New York to discuss investment with Fairfield Sentry. Song Decl., Ex. 10. These allegations are sufficient to constitute a prima facie showing of jurisdiction. *Dorchester Fin. Securities Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 85 (2d. Cir. 2013).

The Defendant has moved to strike the Song Declaration and all attached exhibits. As will be discussed below, the Court will deny the Defendant’s motion to strike. Nevertheless,

even without the Song Declaration and attached exhibits, the Trustee has sufficiently plead allegations supporting jurisdiction over the Defendant.

Arise Out of or Relate to the Defendant's Forum Conduct

As to the second prong, the suit must “arise out of *or relate to* the defendant’s contacts with the forum.” *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, \_\_\_ U.S. \_\_\_, 141 S. Ct. 1017, 1026, 209 L. Ed. 2d 225 (2021) (emphasis in original). “[P]roof that a plaintiff’s claim came about because of the defendant’s in-state conduct” is not required. *Id.* at 1027. Instead, the court need only find “an affiliation between the forum and the underlying controversy.” *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011); *Picard v. BNP Paribas S.A. (In re BLMIS)*, 594 B.R. 167, 190 (Bankr. S.D.N.Y. 2018) (“Where the defendant’s contacts with the jurisdiction that relate to the cause of action are more substantial, however, it is not unreasonable to say that the defendant is subject to personal jurisdiction even though the acts within the state are not the proximate cause of the plaintiff’s injury.”) (internal quotations omitted).

The Trustee is asserting subsequent transfer claims against Defendant for monies it received from the Fairfield Sentry. Compl. ¶¶ 44–47, ECF No. 1. These allegations are directly related to its investment activities with Fairfield and BLMIS. *Picard v. BNP Paribas S.A. (In re BLMIS)*, 594 B.R. 167, 191 (Bankr. S.D.N.Y. 2018) (finding that the redemption and other payments the defendants received as direct investors in a BLMIS feeder fund arose from the New York contacts such as sending subscription agreements to New York, wiring funds in U.S. dollars to New York, sending redemption requests to New York, and receiving redemption payments from a Bank of New York account in New York, and were the proximate cause of the

injuries that the Trustee sought to redress). The suit is affiliated with the alleged in-state conduct. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

#### Reasonableness

Having found sufficient minimum contacts, the Court must determine if exercising personal jurisdiction over the Defendant is reasonable and “comport[s] with fair play and substantial justice.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) (internal quotations omitted). Factors the Court may consider include the burden on the defendant, the forum State’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining convenient and effective relief, the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.

The exercise of jurisdiction is reasonable. The Defendant is not burdened by this litigation. Defendant has actively participated in this Court’s litigation for over ten years. It is represented by highly competent U.S. counsel, filed a claim in this SIPA litigation, and submitted to the jurisdiction of New York courts’ when it signed its subscription agreements with Fairfield Sentry. The forum and the Trustee both have a strong interest in litigating BLMIS adversary proceedings in this Court. *Picard v. Maxam Absolute Return Fund, L.P. (In re BLMIS)*, 460 B.R. 106, 117 (Bankr. S.D.N.Y. 2011), *aff’d*, 474 B.R. 76 (S.D.N.Y. 2012); *Picard v. Chais (In re BLMIS)*, 440 B.R. 274, 278 (Bankr. S.D.N.Y. 2010); *Picard v. Cohmad Sec. Corp. (In re BLMIS)*, 418 B.R. 75, 82 (Bankr. S.D.N.Y. 2009); *Picard v. Fairfield Greenwich Grp., (In re Fairfield Sentry Ltd.)*, 627 B.R. 546, 568 (Bankr. S.D.N.Y. 2021); *see also In re Picard*, 917 F.3d 85, 103 (2d Cir. 2019) (“The United States has a compelling interest in allowing domestic estates to recover fraudulently transferred property.”).

By alleging that Defendant intentionally invested in BLMIS, the Trustee has met his burden of alleging jurisdiction as to each subsequent transfer that originated with BLMIS. The Trustee has made a prima facie showing of personal jurisdiction with respect to the subsequent transfer at issue in this Case.

### **12(b)(6) Standard**

“To survive a motion to dismiss, the complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). The claim is facially plausible when a plaintiff pleads facts that allow the Court to draw a “reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (“Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”). In deciding a motion to dismiss, the Court should assume the factual allegations are true and determine whether, when read together, they plausibly give rise to an entitlement of relief. *Iqbal*, 556 U.S. at 679. “And, of course, a well-pl[ed] complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.” *Twombly*, 550 U.S. at 556.

In deciding the motion, “courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322

(2007). A complaint is “deemed to include any written instrument attached to it as an exhibit[,] . . . documents incorporated in it by reference[,]” and other documents “integral” to the complaint. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152–53 (2d Cir. 2002) (citations omitted). A document is “integral” to a complaint when the plaintiff has “actual notice” of the extraneous information and relied on it in framing the complaint. *DeLuca v. AccessIT Grp., Inc.*, 695 F. Supp. 2d 54, 60 (S.D.N.Y. 2010) (citing *Chambers*, 282 F.3d at 153).

The Trustee is seeking to recover the subsequent transfer of approximately \$20 million made in 2004 to PIFSS by Fairfield Sentry (“Count One”).

#### Count One: Recovery of Subsequent Transfers

Section 550(a) of the Bankruptcy Code states:

Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--

- (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
- (2) any immediate or mediate transferee of such initial transferee.

“To plead a subsequent transfer claim, the Trustee must plead that the initial transfer is avoidable, and the defendant is a subsequent transferee of that initial transferee, that is, that the funds at issue originated with the debtor.” *Picard v. BNP Paribas S.A. (In re BLMIS)*, 594 B.R. 167, 195 (Bankr. S.D.N.Y. 2018); *see also SIPC v. BLMIS (In re Consolidated Proceedings on 11 U.S.C. § 546(e))*, No. 12 MC 115(JSR), 2013 WL 1609154, at \*7 (S.D.N.Y. Apr. 15, 2013) (consolidated proceedings on 11 U.S.C. § 546(e)). “Federal Civil Rule 9(b) governs the portion of a claim to avoid an initial intentional fraudulent transfer and Rule 8(a) governs the portion of a claim to recover the subsequent transfer. *Picard v. BNP Paribas S.A. (In re BLMIS)*, 594 B.R. 167, 195 (Bankr. S.D.N.Y. 2018) (citing *Sharp Int’l Corp. v. State St. Bank & Trust Co., (In re*

*Sharp Int'l Corp.*), 403 F.3d 43, 56 (2d Cir. 2005) and *Picard v. Legacy Capital Ltd. (In re BLMIS)*, 548 B.R. 13, 36 (Bankr. S.D.N.Y. 2016), *rev'd on other grounds, Picard v. Citibank, N.A. (In re BLMIS)*, 12 F.4th 171 (2d Cir. 2021)).

To properly plead a subsequent transfer claim, the Trustee need only provide “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P.

8(a)(2). “The plaintiff must allege the necessary vital statistics—the who, when, and how much—of the purported transfers to establish an entity as a subsequent transferee of the funds. However, the plaintiff’s burden at the pleading stage does not require dollar-for-dollar accounting of the exact funds at issue.” *Picard v. BNP Paribas S.A. (In re BLMIS)*, 594 B.R. 167, 195 (Bankr. S.D.N.Y. 2018). While the Trustee must allege that the initial transfer from BLMIS to Fairfield Sentry is avoidable, he is not required to avoid the transfer received by the initial transferee before asserting an action against subsequent transferees. The Trustee is free to pursue any of the immediate or mediate transferees, and nothing in the statute requires a different result. *IBT Int'l, Inc. v. Northern (In re Int'l Admin. Servs., Inc.)*, 408 F.3d 689, 706-07 (11th Cir. 2005).

The Trustee pleaded the avoidability of the initial transfer (from BLMIS to Fairfield Sentry) by adopting by reference the entirety of the Fairfield Amended Complaint filed against Fairfield Sentry in adversary proceeding 09-1239. Compl. ¶ 35, ECF No. 1 (“The Trustee incorporates by reference the allegations contained in the Fairfield Amended Complaint as if fully set forth herein.”). Whether the Fairfield Amended Complaint properly pleads the avoidability of the initial transfer, is governed by Rule 9(b). Rule 9(b) states: “In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” Fed. R. Civ. P. 9(b). “Where the actual fraudulent transfer claim is asserted by a bankruptcy

trustee, applicable Second Circuit precedent instructs courts to adopt a more liberal view since a trustee is an outsider to the transaction who must plead fraud from second-hand knowledge.

Moreover, in a case such as this one, where the Trustee's lack of personal knowledge is compounded with complicated issues and transactions that extend over lengthy periods of time, the trustee's handicap increases, and even greater latitude should be afforded." *Picard v. Cohmad Secs. Corp.*, (*In re BLMIS*), 454 B.R. 317, 329 (Bankr. S.D.N.Y. 2011) (cleaned up).

#### Adoption by Reference of the Fairfield Amended Complaint

Adoption by reference is governed by Rule 10 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 10(c). Rule 10(c) states: "A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion." The district court has already found that adoption by reference of the entire Fairfield Amended Complaint is proper. *See SIPC v. BLMIS (In re Consolidated Proceedings on 11 U.S.C. § 550(a))*, 501 B.R. 26, 36 (S.D.N.Y. 2013) ("The Trustee's complaint against Standard Chartered Financial Services incorporates by reference the complaints against Kingate and Fairfield, including the allegations concerning the avoidability of the initial transfers, and further alleges the avoidability of these transfers outright. Thus, the avoidability of the transfers from Madoff Securities to Kingate and Fairfield is sufficiently pleaded for purposes of section 550(a).") (cleaned up).

The Court will follow the district court's instruction. As was explained in *In re Geiger*, pleadings filed in the "same action" may be properly adopted by reference in other pleadings in that action. 446 B.R. 670, 679 (Bankr. E.D. Pa. 2010). The Fairfield Amended Complaint was filed in the "same action" as this adversary proceeding for purposes of Rule 10(c). *Id.* Cases within this SIPA proceeding are filed in the same "proceeding"—the SIPA proceeding. *In re Terrestar Corp.*, No. 16 CIV. 1421 (ER), 2017 WL 1040448, at \*4 (S.D.N.Y. Mar. 16, 2017)

(“Adversary proceedings filed in the same bankruptcy case do not constitute different cases.”); *see also Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 610 B.R. 197, 237 (Bankr. S.D.N.Y. 2019) (“The prior decisions within this SIPA proceeding constitute law of the case . . . .”); *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 603 B.R. 682, 700 (Bankr. S.D.N.Y. 2019), (citing *In re Motors Liquidation Co.*, 590 B.R. 39, 62 (S.D.N.Y. 2018) (law of the case doctrine applies across adversary proceedings within the same main case), *aff’d*, 943 F.3d 125 (2d Cir. 2019)); *Perez v. Terrastar Corp. (In re Terrestar Corp.)*, No. 16 Civ. 1421 (ER), 2017 WL 1040448, at \*4 (S.D.N.Y. Mar. 16, 2017) (“Adversary proceedings filed in the same bankruptcy case do not constitute different cases.”), *appeal dismissed*, No. 17-1117 (2d Cir. June 29, 2017); *Bourdeau Bros., Inc. v. Montagne (In re Montagne)*, No. 08-1024 (CAB), 2010 WL 271347, at \*6 (Bankr. D. Vt. Jan. 22, 2010) (“[D]ifferent adversary proceedings in the same main case do not constitute different ‘cases.’”).

Some courts have worried that wholesale incorporation of a pleading can lead to “confusing and inconvenient” results. *Hinton v. Trans Union, LLC*, 654 F. Supp. 2d 440, 446–47 (E.D. Va. 2009) (footnote omitted), *aff’d*, 382 F. App’x 256 (4th Cir. 2010). That is not a concern in these proceedings. PIFSS, like many subsequent transfer defendants in this SIPA proceeding, is uniquely aware of what has been filed in the other adversary proceeding in this SIPA liquidation. It routinely follows what is happening on a proceeding-wide basis. *See* Stip., ECF No. 97 (dismissing adversary proceeding based on consolidated extraterritoriality ruling).

Allowing the Trustee to incorporate the Fairfield Amended Complaint by reference, does not prejudice the Defendant. On the other hand, dismissing this Complaint and permitting the Trustee to amend his Complaint to include all of the allegations that are already contained in the Fairfield Amended Complaint, would prejudice all parties by delaying the already overly

prolonged proceedings. *See Picard v. Fairfield Inv. Fund (In re BLMIS)*, No. 08-01789 (CGM), Adv. No. 09-01239 (CGM), 2021 WL 3477479, at \*4 (Bankr. S.D.N.Y. Aug. 6, 2021) (“Rule 15 places no time bar on making motions to amend pleadings and permits the amending of pleadings “when justice so requires.”).

Through the adoption of the Fairfield Amended Complaint, the Trustee has adequately pleaded, with particularity, the avoidability of the initial transfer due to Fairfield Sentry’s knowledge of BLMIS’ fraud. (Fairfield Compl. ¶¶ 314–18, 09-01239, ECF No. 286); *see also SIPC v. BLMIS (In re Consolidated Proceedings on 11 U.S.C. § 550(a))*, 501 B.R. 26, 36 (S.D.N.Y. 2013) (“[T]he Court directs that the following adversary proceedings be returned to the Bankruptcy Court for further proceedings consistent with this Opinion and Order . . .”).

#### BLMIS Customer Property

The Trustee has pleaded that “[b]ased on the Trustee’s investigation to date, approximately \$30,00,000 of the money transferred from BLMIS to Fairfield Sentry was subsequently transferred by Fairfield Sentry to Defendant PIFSS.” Compl. ¶ 41, ECF No. 1. The parties later stipulated to dismissing recovery of one transfer in the amount of \$10,000,000. Stip., ECF 111.

The exhibits attached to the Complaint provide PIFSS with the “who, when, and how much” of each transfer. *Picard v. BNP Paribas S.A. (In re BLMIS)*, 594 B.R. 167, 195 (Bankr. S.D.N.Y. 2018); Compl., ECF No. 1, Ex. C (indicating the transfer in question occurred on January 21, 2004); *cf. Picard v. Shapiro (In re BLMIS)*, 542 B.R. 100, 119 (Bankr. S.D.N.Y. 2015) (dismissing for failure to plausibly imply that the initial transferee made any subsequent transfers.). The Fairfield Amended Complaint, which is incorporated by reference into this, alleges that the Fairfield Fund was required to invest 95% of its assets in BLMIS. Fairfield

Compl. ¶ 89; *see also* Fairfield Compl. ¶ 91 (“From the beginning, to comport with Madoff’s requirement for BLMIS feeder funds, Fairfield Sentry ceded control of not only its investment decisions, but also the custody of its assets, to BLMIS.”). The Trustee need not prove the path that each transfer took from BLMIS to Fairfield Sentry and subsequently to each redeeming shareholder. The Complaint plausibly alleges that Fairfield Sentry did not have any assets that were not customer property.

Taking all allegations as true and reading them in a light most favorable to the Trustee, the Complaint plausibly pleads that PIFSS received customer property because Fairfield Sentry did not have other property to give. The calculation of Fairfield Sentry’s customer property and what funds it used to make redemption payments are issues of fact better resolved at a later stage of litigation.

#### **Section 546(e)**

The Defendant has raised the “safe harbor” defense, found in 11 USC § 546(e), to the Trustee’s allegations. Section 546(e) is referred to as the safe harbor because it protects a transfer that is a “settlement payment ... made by or to (or for the benefit of) a ... financial institution [or] financial participant,” or that is “made by or to (or for the benefit of) a ... financial institution [or] financial participant ... in connection with a securities contract.” 11 U.S.C. § 546(e). “By its terms, the safe harbor is a defense to the avoidance of the **initial** transfer. *Picard v. BNP Paribas S.A. (In re BLMIS)*, 594 B.R. 167, 197 (Bankr. S.D.N.Y. 2018) (emphasis added). However, where the initial transferee fails to raise a § 546(e) defense against the Trustee’s avoidance of certain transfers, as is the case here, the subsequent transferee is entitled to raise a § 546(e) defense against recovery of those funds. *Picard v. Fairfield Inv. Fund (In re*

*BLMIS*), No. 08-01789 (CGM), Adv. No. 09-01239 (CGM), 2021 WL 3477479, at \*3 (Bankr. S.D.N.Y. Aug. 6, 2021).

In light of the safe harbor granted under 11 U.S.C. § 546(e), the Trustee may only avoid and recover intentional fraudulent transfers under § 548(a)(1)(A) made within two years of the filing date, unless the transferee had actual knowledge of BLMIS's Ponzi scheme, or more generally, "actual knowledge that there were no actual securities transactions being conducted." *SIPC v. BLMIS (In re Consolidated Proceedings on 11 U.S.C. § 546(e))*, No. 12 MC 115(JSR), 2013 WL 1609154, at \*4 (S.D.N.Y. Apr. 15, 2013). "The safe harbor was intended, among other things, to promote the reasonable expectations of legitimate investors. If an investor knew that BLMIS was not actually trading securities, he had no reasonable expectation that he was signing a contract with BLMIS for the purpose of trading securities for his account. In that event, the Trustee can avoid and recover preferences and actual and constructive fraudulent transfers to the full extent permitted under state and federal law." *Picard v. Legacy Capital Ltd. (In re BLMIS)*, 548 B.R. 13, 28 (Bankr. S.D.N.Y. 2016) (internal citations omitted), *vacated and remanded on other grounds, Picard v. Citibank, N.A. (In re BLMIS)*, 12 F.4th 171 (2d Cir. 2021)). "In sum, if the Trustee sufficiently alleges that the [initial] transferee from whom he seeks to recover a fraudulent transfer knew of [BLMIS]'[s] fraud, that transferee cannot claim the protections of Section 546(e)'s safe harbor." *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, No. 08-01789 (CGM), 2021 WL 3477479, at \*4 (Bankr. S.D.N.Y. Aug. 6, 2021).

This Court has already determined that the Fairfield Amended Complaint contains sufficient allegations of Fairfield Sentry's actual knowledge to defeat the safe harbor defense on a Rule 12(b)(6) motion. *See Picard v. Fairfield Inv. Fund (In re BLMIS)*, No. 08-01789 (CGM), Adv. No. 09-01239 (CGM), 2021 WL 3477479, at \*4 (Bankr. S.D.N.Y. Aug. 6, 2021) ("[T]he

Trustee has alleged that the agents and principals of the Fairfield Funds had actual knowledge of Madoff's fraud"). In that adversary proceeding, the Court held that "[t]he Trustee has pled [actual] knowledge in two ways: 1) that certain individuals had actual knowledge of Madoff's fraud, which is imputed to the Fairfield Funds; and 2) that actual knowledge is imputed to the Fairfield Funds through 'FGG,' an alleged 'de facto' partnership." *Id.* at \*4; *see also* Fairfield Compl. ¶ 320 ("Fairfield Sentry had actual knowledge of the fraud at BLMIS"); Fairfield Compl. ¶ 321 ("Greenwich Sentry and Greenwich Sentry Partners had actual knowledge of the fraud at BLMIS"); Fairfield Compl. ¶ 322 ("FIFL had actual knowledge of the fraud at BLMIS"); Fairfield Compl. ¶ 323 ("Stable Fund had actual knowledge of the fraud at BLMIS"); Fairfield Compl. ¶ 324 ("FG Limited had actual knowledge of the fraud at BLMIS"); Fairfield Compl. ¶ 325 ("FG Bermuda had actual knowledge of the fraud at BLMIS"); ¶ 326 ("FG Advisors had actual knowledge of the fraud at BLMIS"); Fairfield Compl. ¶ 327 ("Fairfield International Managers had actual knowledge of the fraud at BLMIS"); Fairfield Compl. ¶ 328 ("FG Capital had actual knowledge of the fraud at BLMIS"); Fairfield Compl. ¶ 329 ("Share Management had actual knowledge of the fraud at BLMIS"); Fairfield Compl. ¶ 9 ("It is inescapable that FGG partners knew BLMIS was not trading securities. They knew BLMIS's returns could not be the result of the split strike conversion strategy (the "SSC Strategy"). They knew BLMIS's equities and options trading volumes were impossible. They knew that BLMIS reported impossible, out-of-range trades, which almost always were in Madoff's favor. They knew Madoff's auditor was not certified and lacked the ability to audit BLMIS. They knew BLMIS did not use an independent broker or custodian. They knew Madoff refused to identify any of BLMIS's options counterparties. They knew their clients and potential clients raised numerous due diligence questions they would not and could not satisfactorily answer. They knew Madoff would refuse to

provide them with honest answers to due diligence questions because it would confirm the details of his fraud. They knew Madoff lied about whether he traded options over the counter or through the exchange. They knew they lied to clients about BLMIS's practices in order to keep the money flowing and their fees growing. And they knowingly misled the SEC at Madoff's direction.").

This Court determined that the Fairfield Amended Complaint is replete with allegations demonstrating that Fairfield Sentry had actual knowledge that BLMIS was not trading securities. *See Picard v. Fairfield Inv. Fund (In re BLMIS)*, No. 08-01789(CGM), Adv. No. 09-01239 (CGM), 2021 WL 3477479, at \*3–\*7 (Bankr. S.D.N.Y. Aug. 6, 2021). The district court determined that “those defendants who claim the protections of Section 546(e) through a Madoff Securities account agreement but who actually knew that Madoff Securities was a Ponzi scheme are not entitled to the protections of the Section 546(e) safe harbor, and their motions to dismiss the Trustee’s claims on this ground must be denied. *SIPC v. BLMIS (In re Consolidated Proceedings on 11 U.S.C. § 546(e))*, No. 12 MC 115(JSR), 2013 WL 1609154, at \*10 (S.D.N.Y. Apr. 15, 2013). And “to the extent that a defendant claims protection under Section 546(e) under a separate securities contract” this Court was directed to “adjudicate those claims in the first instance consistent with [the district court’s] opinion.” *See Order*, 12-MC-115, ECF No. 119, Ex. A at 24.

This Court is powerless to reconsider this issue, agrees with the district court’s reasoning, and finds its holding consistent with *dicta* set forth by the Court of Appeals for the Second Circuit. *See Picard v. Ida Fishman Revocable Trust (In re Bernard L. Madoff Inv. Sec. LLC)*, 773 F.3d 411, 420 (2d Cir. 2014) (“The clawback defendants, having every reason to believe that BLMIS was actually engaged in the business of effecting securities transactions, have every right

to avail themselves of all the protections afforded to the clients of stockbrokers, including the protection offered by § 546(e).”). The Trustee’s allegations in the Fairfield Amended Complaint are sufficient to survive a Rule 12(b)(6) motion on this issue.

The Safe Harbor Cannot be Used to Defeat a Subsequent Transfer

The Defendant argues that the safe harbor prevents the Trustee from avoiding the subsequent transfer between Fairfield Sentry and PIFSS on account of the securities contract between Fairfield and the Defendant.

The safe harbor is not applicable to subsequent transfers. “By its terms, the safe harbor is a defense to the avoidance of the *initial* transfer.” *Picard v. BNP Paribas S.A. (In re BLMIS)*, 594 B.R. 167, 197 (Bankr. S.D.N.Y. 2018) (emphasis in original); *see also* 11 U.S.C. § 546(e) (failing to include § 550 in its protections). Since there must be an initial transfer in order for the Trustee to collect against a subsequent transferee, a subsequent transferee may raise the safe harbor as a defense—but only in so far as the avoidance of the initial transfer is concerned. The safe harbor cannot be used as a defense by the subsequent transferee because the Trustee is not “avoiding” a subsequent transfer, “he recovers the value of the avoided initial transfer from the subsequent transferee under 11 U.S.C. § 550(a), and the safe harbor does not refer to the recovery claims under section 550.” *Picard v. BNP Paribas S.A. (In re BLMIS)*, 594 B.R. 167, 197 (Bankr. S.D.N.Y. 2018).

The Defendant’s reliance on *SIPC v. BLMIS (In re Consolidated Proceedings on 11 U.S.C. § 546(e))*, No. 12 MC 115(JSR), 2013 WL 1609154, at \*7 (S.D.N.Y. Apr. 15, 2013) (“Cohmad”) is unavailing. In *Cohmad*, Judge Rakoff clearly laid out the “one caveat” to the general rule that the Trustee must show “the initial transfer of . . . by the debtor is subject to avoidance under one of the Bankruptcy Code’s avoidance provisions.” *Id.* That is, a subsequent

transferee with actual knowledge of the fraud “cannot prevail on a motion to dismiss on the basis of Section 546(e)'s safe harbor.” *Id.* This caveat only pertains to a subsequent transferee with actual knowledge. It is the “one caveat.” *Id.* *Cohmad* did not “leave open” any additional caveats to subsequent transferees who lack actual knowledge.

The Defendant argues that this Court applied the safe harbor to redemption payments made by Fairfield Sentry in *In re Fairfield Sentry Ltd.*, 2020 WL 7345988, at \*5 (Dec. 14, 2020) (“*Fairfield III*”). Reliance on this case is misplaced. While many facts overlap between this SIPA liquidation of BLMIS and the foreign liquidation of BLMIS’s largest feeder fund, Fairfield Sentry, the legal holdings in these liquidations are not interchangeable. In this case, the Court is analyzing subsequent transfers; in *Fairfield III* the Court was analyzing initial transfers. The safe harbor is not available to be raised as defense to subsequent transfer claims.

In *Fairfield III*, this Court analyzed whether the safe harbor applied to avoidance claims under BVI law<sup>2</sup> to recover “unfair preferences” and “undervalue transactions” and constructive trust claims against a defendant who allegedly “knew or willfully blinded itself to the fact that the [Fairfield Sentry’s] BLMIS investments were worthless or virtually worthless.” *In re Fairfield Sentry Ltd.*, No. 10-13164 (SMB), 2020 WL 7345988, at \*1 (Bankr. S.D.N.Y. Dec. 14, 2020), *reconsideration denied*, No. 10-13164 (SMB), 2021 WL 771677 (Bankr. S.D.N.Y. Feb. 23, 2021). The Court was not considering the safe harbor’s effect on subsequent transfer claims brought under § 550 of the Bankruptcy Code. In the Fairfield Sentry liquidation, Defendant would be an initial transferee as redemption payments paid by Fairfield Sentry were paid directly to the Defendant. *Fairfield III* is not applicable here.

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<sup>2</sup> Fairfield Sentry liquidated under the laws of the British Virgin Islands (“BVI”) and this Court’s chapter 15 case is ancillary to the primary proceeding brought in the BVI.

Defendant is not permitted to raise the safe harbor defense on its own behalf as a subsequent transferee.

### **The Motion to Strike**

The Defendant seeks to strike the declaration by Brian Song and the attached exhibits for lacking a basis in personal knowledge, lacking foundation, hearsay, failure to authenticate, and lack of relevance. The Court of Appeals for the Second Circuit has “long made clear” that a court has “considerable procedural leeway” in deciding a pretrial motion to dismiss for lack of personal jurisdiction. *Dorchester Fin. Sec, Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 84 (2d Cir. 2013). The Court “may determine the motion on the basis of affidavits alone; or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion.” *Id.* (quoting *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981)). “Prior to discovery, a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith.” *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir. 1990).

It is only after discovery that the prima facie showings should be factually supported with admissible evidence. *Id.*; *Astor Chocolate Corp. v. Elite Gold Ltd.*, 510 F. Supp. 3d 108, 121 (S.D.N.Y. 2020) “[A] court, in resolving a Rule 12(b)(2) motion ***made after jurisdictional discovery***, may consider only admissible evidence.”) (emphasis added). Even at that later stage, the Court may consider evidence that is not presented in admissible form. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (rejecting the argument that “the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment”).

The Defendant has not shown that the exhibits are ultimately inadmissible. Arguments as to the lack of foundation and hearsay nature of the exhibits are premature.

At this stage of the proceedings, counsel may submit a sworn statement including facts and exhibits. *Knowyourmeme.com Network v. Nizri*, No. 20-CV-9869 (GBD) (JLC), 2021 WL 3855490, at \*9 (S.D.N.Y. Aug. 30, 2021); *see also Kulhawik v. Holder*, 571 F.3d 296, 298 (2d Cir. 2009) ([W]hen an attorney makes statements under penalty of perjury in an affidavit or an affirmation, the statements do constitute part of the evidentiary record and must be considered."). "While bone fide evidentiary objections can and should be considered at the summary judgment stage . . . the fact that documents were attached to an attorney declaration without a supplemental affidavit by a document custodian or another with knowledge does not make them inadmissible for that reason." *Ball v. Soundview Composite Ltd. (In re Soundview Elite Ltd.)*, 543 B.R. 78, 100 (Bankr. S.D.N.Y. 2016).

The Defendant has not challenged the ultimate credibility of the Song Declaration and attached exhibits. The Court will not strike any part of the Song Declaration or attached exhibits for lack of authentication.

While personal jurisdiction can be established from the Complaint alone, the Song Declaration and attached exhibits are relevant to the Trustee's claims. Evidence is relevant where "it has any tendency to make a fact more or less probable than it would be without the evidence" and where "the fact is of consequence in determining the action." Fed. R. Evid. 401. "When sought to expunge irrelevant factual matters, a strike motion will not be granted unless those matters have no clear bearing on the issues in dispute." *Yankees Entm't & Sports Network, LLC v. Cablevision Sys. Corp.*, 224 F. Supp. 2d 657, 676 (S.D.N.Y. 2002) (citing *Reiter's Beer Distributors, Inc. v. Schmidt Brewing Co.*, 657 F. Supp. 136, 143 (E.D.N.Y. 1987) ("Motions to

strike are generally disfavored and will not be granted unless the matter asserted clearly has no bearing on the issue in dispute.”))

The exhibits attached to the Song Declaration may bear on the issues in dispute. The exhibits contain information that investors in Fairfield Sentry were given (Song Decl., Ex. 1); records of PIFSS’s subscriptions and redemptions with Fairfield Sentry (Ex. 2–6); and emails showing meetings between the Fairfield Greenwich Group and PIFSS or its subsidiary, Wafra. (Ex. 7–13). These matters are closely related to establishing personal jurisdiction over the Defendant.

The Trustee has made sufficient allegations concerning personal jurisdiction in the Complaint. Compl., ECF No. 1. While these allegations are sufficient by themselves to establish jurisdiction, the Trustee has provided further allegations in the opposition to the motion to dismiss with the Song Declaration and attached exhibits. Opp’n, ECF No. 122; Song Decl., ECF No. 123. The Court will not strike the Song Declaration or attached exhibits.

### **Conclusion**

For the foregoing reasons, PIFSS’s motion to dismiss and motion to strike are denied. The Trustee shall submit a proposed order within fourteen days of the issuance of this decision, directly to chambers (via E-Orders), upon not less than two days’ notice to all parties, as required by Local Bankruptcy Rule 9074-1(a).

**Dated: August 17, 2022**  
**Poughkeepsie, New York**



**/s/ Cecelia G. Morris**

**Hon. Cecelia G. Morris**  
**U.S. Bankruptcy Judge**

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*Attorneys for Defendant The Public Institution for Social Security*

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES INVESTOR PROTECTION  
CORPORATION,

Plaintiff-Applicant,

v.

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Defendant.

Adv. Pro. No. 08-01789 (CGM)

SIPA LIQUIDATION

(Substantively Consolidated)

In re:

BERNARD L. MADOFF,

Debtor.

IRVING H. PICARD, Trustee for the  
Liquidation of Bernard L. Madoff  
Investment Securities LLC, and Bernard L.  
Madoff,

Plaintiff,

Adv. Pro. No. 12-01002 (CGM)

v.

THE PUBLIC INSTITUTION FOR  
SOCIAL SECURITY,

Defendant.

**NOTICE OF DEFENDANT THE PUBLIC INSTITUTION FOR SOCIAL SECURITY'S  
MOTION FOR LEAVE TO APPEAL**

Defendant The Public Institution for Social Security ("PIFSS") hereby provides notice in accordance with Local Bankruptcy Rule 8010-1 that it has filed with the clerk of this Court at ECF No. 155 for transmittal to the United States District Court for the Southern District of New York a motion pursuant to 28 U.S.C. § 158(a)(3) and Federal Rule of Bankruptcy Procedure 8004 for leave to appeal this Court's Order entered September 1, 2022 (ECF No. 150) denying PIFSS' motion to dismiss the complaint of Plaintiff Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC and the Chapter 7 Estate of Bernard L. Madoff.

Dated: October 6, 2022  
New York, New York

**GREENBERG TRAURIG, LLP**

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